(1)

No. 88-309

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF WYOMING,

Petitioner,

v.

UNITED STATES OF AMERICA, SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

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QUESTIONS PRESENTED

Under the implied-reservation-of-water doctrine, a Federal reserved water right was awarded by the Wyoming state courts for all practicably irrigable land within the present boundaries of the Wind River Indian Reservation. The Federal reserved water right was quantified in the approximate amount of 500,000 acre-feet per annum, for the irrigation of some 100,000 acres, and was awarded a priority as of 1868, the date of the treaty establishing the Reservation. Pursuant to congressional directive in 1905, however, water rights for the irrigation of 145,000 acres of Indian lands had been obtained under state law, overlapping more than 70% of the lands for which the Federal right was subsequently adjudicated.

The questions presented are:

1. Can a Federal reserved water right impliedly exist for the Reservation despite an express Congressional requirement that the Reservation's water rights be obtained under state law?

If so,

2. In the absence of any demonstrated necessity for additional water to fulfill reservation purposes and in the presence of substantial state water rights long in use on the Reservation, may a reserved water right be implied for all practicably irrigable lands within a Reservation set aside for a specific tribe?

3. What priority date should be accorded a reserved water right, if any, for practicably irrigable lands which were ceded by the Reservation's Tribes, if those lands later were restored to and made a part of the reservation by the United States or were reacquired by Indians from non-Indians?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, State of Wyoming, and the respondents, United States of America, Shoshone Tribe of the Wind River Indian Reservation, Northern Arapaho Tribe of the Wind River Indian Reservation, Mary O. Ahlborn, Eva M. Barnett, Owen Barnett, Bradford-Bath, Donald Bath, Black Butte Livestock Company, Campbells, Inc., City of Riverton, Wyoming, Kenneth Ward Crandall, Phyllis L. Crandall, DHB & Co., Barbara J. Daniels, Billie M. Daniels, Deaver Irrigation District, Carl Dockery, Carol Dockery, Clyde R. Fisher, Gloria A. Fisher, Charles Goldben, Grace Graboski, Griffin Brothers, Incorporated, Olga J. Harvey, Robert W. Harvey, Albert Hornecker, Hornecker Livestock Co., Inc., Bertha Jones, Brenda Joyce Kellogg, Gary V. Kellogg, Irene M. Long, Russell E. Long, Elsie Martin, Richard Martin, William A. Matthews, Arthur D. McCumber, Marvin W. Meyer, Ernestine S. Meyer, Midvale Irrigation District, Carolyn R. Nelson, Vern Nelson, Norwest Bank of Omaha, N.A., Norris Edwin Odee, F. Louise Odee, William Okie, Kenneth Outland, Iona Outland, Owl Creek Irrigation District members, PLB & Co., Sylvia Paulsen, Red Creek Cattle Company, Red Lane Watershed Improvement District, Jerry D. Redding, Sheila C. Redding, Charles Richardson, Riverton Valley Irrigation District, C. Duane Rush, Kathryn C. Rush, Brian F. Sanford, Kathleen Sanford, Norman L. Sanford, Daisy E. Sessions, Newell S. Sessions, Barbara Smith, Robert Stewart, Town of East Thermopolis, Wyoming, Ralph Floyd Urbigkit, V E Bar Livestock Company, Barbara Webber, Landis Webber, Delores J. Weese, Raymond C. Weese, Willwood Irrigation District, Ruth Clare Yonkee.

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Pursuant to Rule 21.1(k), the material required by Rule 21.1(f), (h), and (k), being too voluminous to be conveniently included in or with the petition, is presented in separately bound Volumes I and II.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

The Petitioner, State of Wyoming, respectfully requests that a writ of certiorari issue to review the judgment of the Wyoming Supreme Court entered on February 24, 1988.

OPINIONS BELOW

The February 24, 1988, opinion of the Wyoming Supreme Court, 753 P.2d 76 (Wyo. 1988), is reprinted in the separately bound Appendix A hereto, at p. 1a. That court's order denying petitions for rehearing is reprinted in Appendix B, p. 120a. The amended judgment and decree of the state district court, May 24, 1985, is reprinted in Appendix D, at p. 168a; as are the district court's Order of May 24, 1985, ruling on its master's supplemental and final report, Appendix C, at p. 121a, the district court's judgment of May 10, 1983, ruling on its master's initial report, Appendix F, at p. 202a, and the district court's order of June 8, 1984, ruling on various post-judgment motions, Appendix E, at p. 185a. The supplemental and final report of the district court's master, dated June 1, 1984, is reprinted in the Appendix hereto, Appendix G, at p. 280a, as is the master's initial report of December 15, 1982, Appendix H, at p. 367a. The Federal district court's order, remanding the matter back to state court and its findings of fact and conclusions of law therein, dated May 31, 1977, have not been reported and are reprinted in Appendix I hereto, at p. 718a.

JURISDICTION

The decision of the Wyoming Supreme Court was rendered on February 24, 1988, affirming in part and reversing in part the amended judgment and decree of the state district court, and remanding the matter for further proceedings consistent with the opinion. The Wyoming Supreme Court denied timely petitions for rehearing on April 22, 1988. This Court's Order Extending Time to File Petition for Writ of Certiorari to August

20, 1988, was entered in A-14 on July 7, 1988. The jurisdiction of this Court to review the judgment of the Wyoming Supreme Court is invoked under 28 U.S.C. § 1257(3). The finality of the Wyoming Supreme Court's judgment is described in the Statement of the Case, at note 7, *infra*, and the accompanying text.

TREATY, STATUTES AND ORDERS INVOLVED

The provisions of the treaty, statutes and regulations which this case involves are set forth in the separately presented Appendix, at the page indicated following the citations below:

Second Treaty of Fort Bridger, 15 Stat. 673 (1868), Appendix AA, p. 793a.

Wyoming Constitution, Article VIII, § 1, 3 (1890), Appendix Z, p. 792a.

Wyoming Admission Act, 26 Stat. 222 (1890), Appendix Y, p. 782a.

The Act of March 3, 1905, 33 Stat. 1016 (1905), Appendix X, p. 769a.

Act of June 18, 1934, Ch. 576, 48 Stat. 984 (1934), Appendix W, p. 753a.

Act of July 27, 1939, 53 Stat. 1128 (1939), Appendix BB, p. 804a.

First permanent restoration order, 5 Fed. Reg. 1805 (1940) Appendix V, p. 751a.

Second permanent restoration order, 7 Fed. Reg. 7458 (1942); Correction to Regulation, 7 Fed. Reg. 9439 (1942), Appendix U, p. 748a.

Third permanent restoration order, 7 Fed. Reg. 11100 (1942) Appendix T, p. 746a.

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Fifth permanent restoration order, 9 Fed. Reg. 9749 (1944); Order Amending Order of Restoration, 10 Fed. Reg. 2812 (1945), Appendix R, p. 741a.

Sixth permanent restoration order, 10 Fed. Reg. 2254 (1945), Appendix Q, p. 739a.

Seventh permanent restoration order, 10 Fed. Reg. 7542 (1945), Appendix P, p. 737a.

Eighth permanent restoration order, 13 Fed. Reg. 8818 (1948), Appendix O, p. 735a.

Act of August 15, 1953, Pub. L. No. 284, 67 Stat. 592, Appendix N, p. 731a.

Tenth permanent restoration order, 39 Fed. Reg. 27561 (1974), Appendix L, p. 729a.

STATEMENT OF THE CASE

This general adjudication of all water rights in Wyoming's Big Horn River basin, comprising over thirteen million acres (twenty-one thousand square miles), began in January, 1977, with the filing of the petitioner's complaint and service of process on over twenty thousand water users, pursuant to Wyo. Stat. § 1-1054.1 (1957) (now Wyo. Stat. § 1-37-106 (1977)), Appendix K, p. 726a., and the McCarran Amendment, 43 U.S.C. 666. The United States, claiming water rights in both its proprietary capacity and as trustee for the Shoshone and Arapaho Tribes of the Wind River Indian Reservation, removed the adjudication to the United States District Court which remanded the adjudication to state court. Appendix I, p. 718a. The state district court denied motions to dismiss by the Tribes and the United States, allowed the Tribes to intervene, and appointed a special master. The master divided the adjudication into three phases: (1) federal water right claims by and on behalf of the Indian Tribes, which are now before this Court, (2) federal water right claims of the United States in its proprietary capacity (e.g., Yellowstone National Park and two national forests) which were resolved by negotiation and were the subject of final judgment from which no appellate review was sought, and (3) approximately 27,000 claims by all parties based solely on state law, which are still before the state district court's master. Appendix D, p. 168a.

The Wind River Indian Reservation

Originally part of the public domain created by the Louisiana Purchase, the Wind River Indian Reservation was selected by the Shoshone pursuant to what is known as the Second Treaty of Fort Bridger of 1868, 15 Stat. 673. Appendix AA, p. 793a. Subsequently, the Arapaho were settled on the Reservation. *See Shoshone Tribe v. United States*, 299 U.S. 476 (1937). Through a period ending in 1905, the Reservation was three times reduced in size by agreement with the Tribes. The last and most substantial reduction (1,480,000 acres) was effected by the Second McLaughlin Agreement of 1904, ratified by the Act of March 3, 1905, 33 Stat. 1016, hereinafter "1905 Act." Appendix X, at 776a, *et seq.* Under an active allotment program, some 2,500 allotments, comprising over 240,000 acres, passed into individual Indian ownership. Wyo. Ex. WRIR PW-2, p. 260.

The 1904 Agreement ceded to the United States all lands north of the Big Wind and east of the Popo Agie and the Little Wind. For roughly 35 years the remaining or "diminished" Reservation's exterior boundaries remained stable. Outside of those boundaries, however, the ceded lands were returned to public domain status,[1] 88,000 acres were entered and settled by non-Indians by 1918, and 336,000 acres were withdrawn for a major reclamation project, to be disposed of by homestead entry,

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[1] The Reservation's Indians agreed to "cede, grant and relinquish" the lands to the United States. Act of March 3, 1905, 33 Stat. 1016, Appendix D, p. 769a. Following approval of the cession, on June 2, 1906, President Roosevelt proclaimed the ceded lands opened to public entry under the "homestead, townsite, coal and mineral land laws." Wyo. Ex. WR-33.3D. 34 Stat. 3208 (1906). Congress thereafter referred to the ceded lands as "lands formerly embraced" by the Reservation, Ch. 151, 34 Stat. 849 (January 7, 1907). Simultaneously, the ceded lands were uniformly excluded from the Reservation as it was portrayed on maps prepared by the United States Department of Interior in 1907, 1912 and 1923, State's Ex. 32-10, 12 and 15. *C.f. Merrill v. Bishop*, 287 P.2d 620, 625 (Wyo. 1955); *McKinney v. Big Horn Basin Development Co.*, 167 F. 770, 775 (D. Wyo. 1909).

Act of March 4, 1921, Ch. 161, 41 Stat. 1367, at 1404. The Reservation's diminished and ceded portions, as well as the reclamation withdrawal, are shown on the map attached hereto as Exhibit A.

Reservation Water Development Pursuant to State Law

Under what was known as the "Water Proviso" of the 1905 Act's Article III, Appendix X, at pp. 778-79a, a part of the proceeds from the sale of ceded lands were designated to obtain water rights for the Indians under Wyoming law. *See* note 12, *infra*. This amount, together with supplemental federal appropriations of $2,264,100, was used to fund the acquisition of water permits and the development of canals, reservoirs and cultivated lands to perfect the permitted rights. Wyo. Ex. WRIR I&P Ex. 225, 234, 235, 14 and Ex. PW-2. By 1915, state water rights had been acquired on behalf of the Indians for the irrigation of approximately 145,000 acres of Reservation lands, including over 70% of the lands for which Federal reserved water rights were eventually awarded, *see* note 4, *infra*, and major federal irrigation projects had been constructed for the benefit of Indian lands. During the same period, 3,500-4,000 non-Indians entered the lands ceded by the 1904 agreement and applied for state permits to irrigate approximately 400,000 acres. Wyo. Exs. PW-2, at p. 234, SR-5. Development of Indian irrigation projects on the Reservation was characterized by extensive cooperation between the Indian Service and the Wyoming State Engineer. From 1905 to 1963, as delays in completing project construction on portions of the diminished Reservation prevented timely application of water to beneficial use upon many Indian tracts, extensions were routinely granted by the State Engineer. Furthermore, during this period, water was applied to beneficial use on many Indian tracts (both fee allotted and trust lands) and certificates of appropriation were issued by the State Board of Control confirming water rights, generally with a 1905 priority date. Wyo. Ex. SR-8.

As would be expected, however, announcement of *Winters v. United States*, 207 U.S. 564 (1908), and the opinions which it affirmed, caused some Indian advocates to seek application of the *Winters*' implied-reservation-of-water doctrine to the Wind River Indian Reservation. Consistent with its 1905 decision to require the Tribes to define and perfect their water rights under the doctrine of prior appropriation, pursuant to Wyoming law, Congress rebuffed several attempts to change the law, including attempts to create an express reserved water right for the Reservation. *See* note 11, *infra*. The steady progress of the Indian Service in its work to build irrigation systems within the Reservation doubtless lent support to arguments of Congressmen that the system put in place by the 1905 Act was working satisfactorily. In 1963, however, following announcement of *Arizona v. California*, 373 U.S. 546 (1963), the Indian Service (now the BIA) no longer requested extension of deadlines by the State Engineer. Consequently, unperfected state-awarded water right permits expired for 58,000 acres, leaving perfected state-awarded water rights in place for 87,000 acres. Wyo. Ex. WRIR, SR-8. Although no extensions for Indian project permits have been requested or granted since 1963, those permits may be reinstated upon application to the Wyoming State Engineer.

Restoration and Reacquisition of Ceded Lands

Following cession in 1905, several hundred thousand acres of ceded land were acquired by non-Indians. Wyo. Ex. PW-2, p. 246. In 1934, however, Congress authorized the "restoration to tribal ownership" of Reservation lands such as those ceded in 1905. Act of June 18, 1934, Ch. 576, Sec. 3, 48 Stat. 984 (1934), Appendix W, p. 753a. Shortly thereafter, the unclaimed public lands within the area ceded by the 1904 agreement which had not yet passed into private ownership were temporarily withdrawn from further entry. U.S. Exh. WR-20. The Act of July 27, 1939, Ch. 386, 53 Stat. 1128 (1939), authorized the Secretary of Interior to acquire ceded lands in non-Indian ownership and to restore undisposed

of ceded lands. Appendix BB, p. 804a. From time to time thereafter, beginning in 1940 and ending in 1974, large tracts of vacant ceded lands, needed by the Tribes for grazing purposes, were permanently "restored to" and "made a part of" the Reservation by the United States.[2] During roughly the same period, numerous non-Indian in-holdings within the ceded area were purchased or "reacquired" by or for the Tribes.[3] Nevertheless, at present approximately 42,000 acres of lands originally allotted to individual Indians have been conveyed to non-Indian grantees within the Reservation. Wyo. Ex. PW-2. In addition, several thousand other non-Indians live either on ceded lands patented under the public land laws after 1905 or on lands in the large Riverton Reclamation Withdrawal located on ceded lands, within the current boundaries of the Reservation.

Adjudication of the Reservation's Reserved Water Right

The United States claimed federal water rights on behalf of the Reservation's Tribes under the implied-reservation-of-water doctrine. The Tribes subsequently

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[2] These restoration orders by the Secretary of the Interior generally recited that the ceded land was "urgently required as grazing land for the use of the Shoshone-Arapaho Tribes of Indians in order to properly support and develop their rapidly expanding cattle industry" and directed that the "undisposed-of" ceded lands be "restored to tribal ownership for the use and benefit of the Shoshone-Arapaho Tribes of Indians of the Wind River Reservation, Wyoming, and are *added to and made a part of* the existing Wind River Reservation." (emphasis added) *See* 5 Fed. Reg. 1805 (1940), Appendix V, p. 751a; 7 Fed. Reg. 7458 (1942), Appendix U, p. 748a; 7 Fed. Reg. 11100 (1942), Appendix T, p. 746a; 8 Fed. Reg. 6857 (1943), Appendix S, p. 744a; 9 Fed. Reg. 9749 (1944), Appendix R, p. 741a; 10 Fed. Reg. 2254 (1945), Appendix Q, p. 739; 10 Fed. Reg. 7542 (1945), Appendix P, p. 737a; 13 Fed. Reg. 8818 (1948), Appendix O, p. 735a; 39 Fed. Reg. 27561 (1974), Appendix L, p. 729a, *c.f.* Act of Aug. 15, 1953, Pub. L. No. 284, 67 Stat. 592, Appendix N, p. 731a.

[3] These reacquisitions were made by the United States with the proceeds of the Shoshone Judgment Fund, *see* Ch. 387, 53 Stat. 1128, July 27, 1939, Appendix BB, p. 804a, and *U.S. v. Shoshone*, 304 U.S. 111 (1938) and by individual Indian families.

concluded that the United States' reserved water right claims were inadequate and filed their own supplemental claims both before and during trial. In addition, non-Indian grantees who held lands originally allotted to individual Indians subsequently claimed reserved water rights.

Claims By and on Behalf of the Tribes

After trial, the master recommended a decree granting an 1868 reserved water right in the amount of 477,300 acre-feet per annum, quantified based on practicably irrigable lands within both the diminished and ceded portions of the Reservation.[4] In addition, the master recommended the award of a reserved water right for a variety of non-agricultural purposes. Appendix H, at p. 696a, *et seq.* The district court rejected the master's recommendations for non-agricultural reserved rights but awarded (1) an 1868 reserved water right of 350,000 acre-feet for 37,300 acres of historically irrigated lands, Appendix D, at pp. 169-72a, paragraph 1, and 48,100 acres identified for inclusion in future projects, *id.*, at p. 172a, paragraph 2, and (2) a reserved water right of 84,800 acre-feet with varying priority dates, based on practicably irrigable reacquired lands, of which 16,900 had been historically irrigated and 400 were to be included in future projects. *Id.*, at p. 168a, paragraph 3, and p. 182a. The district court concluded that the priority date for the reserved water right for reacquired lands would be the earlier of: (1) the date on which the land was first sold to a non-Indian, (2) the date on which water was first put to beneficial use (without regard to quantity of acres irrigated), or (3) the date of any applicable state permit. *Id.*, at p. 173a.

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[4] Including 54,200 acres of historically irrigated lands, also covered by state water rights, and 48,520 acres which had never been irrigated but which were included within future Indian irrigation projects. Appendix H, pp. 671-72a, findings of fact 95 and 96, pp. 681-82a, finding of fact 60. Over 20,000 acres of lands within the future projects were the subject of state water right permits. Wyo. Ex. WRIR SR-3 (Rev.).

Claims by Allottees' Grantees

A number of non-Indians claimed that they succeeded to an 1868 Indian reserved water right when they or their predecessors acquired allotments of land originally granted to individual Indians. These claims by allottees' grantees were opposed by the State, the United States, and the Tribes. The Master recommended that the claims be denied, Appendices H, at p. 640a, paragraph 16, and G, at p. 326a, paragraph 3, and the district court accepted and incorporated that recommendation in its final judgment. Appendices F, at pp. 224-25a, C, at p. 129a, paragraph A.

Action by the Wyoming Supreme Court

A closely divided Wyoming Supreme Court (3-2) affirmed the judgment of the district court, except for (1) an increase of 21,000 acre-feet in the amount of the 1868 reserved water right based on the future projects, reversing a 10% reduction recommended by the Master and adopted by the district court and increasing the total award to 500,420 acre feet, (2) the reversal of the lesser priority date for the reserved water rights quantified for reacquired lands, and (3) the reversal and remand for further hearing of the district court's denial of reserved rights claimed by allottees' grantees who were not Indians. Appendix A, at pp. 56-58a, 75a, and 72-75a, respectively. The judgment of the Wyoming Supreme Court awarded an 1868 Indian reserved water right based on 40,300 practicably irrigable acres of unsold ceded lands which had been restored and added to the Reservation during the period of 1940-1974 [5] and based on 19,500 acres of practicably irrigable lands which had been reacquired from non-Indian ownership during approximately the same period.[6] The judgment of the Wyoming

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[5] 38,000 acres in future projects and 2,300 acres of historically irrigated lands.

[6] 12,400 acres of trust lands historically irrigated, 2,600 acres of trust lands designated for future projects, and 4,500 acres of historically irrigated Indian fee lands.

Supreme Court is final on its face, except for the remand to the district court with instructions to award an 1868 reserved water right to the allottees' grantees for practicably irrigable land which ". . . they can show were irrigated by their Indian predecessors or put under irrigation within a reasonable time thereafter." Appendix A, at p. 75a. Under this Court's decisions, this remand for such a factual determination does not deprive the decision below of finality.[7]

Positions of the Parties Below

In general, the United States and Tribes asserted an 1868 priority for a reserved water right based on the amount of water needed to irrigate all practicably irrigable acreage within the Reservation and for other broadly defined purposes.[8] The State and most other

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[7] Under this Court's holding in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), such a remand does not disturb the finality of the Wyoming Supreme Court's judgment. The question which the Wyoming Supreme Court remanded, the amount of land now owned by non-Indians which was originally irrigated by Indians or by non-Indians within a reasonable time after their acquisition, is a question of fact. Therefore, this matter falls within the exceptions outlined in *Cox, supra*, 420 U.S. at 480, 482-83, which justify this Court's taking jurisdiction before absolute finality below. The Wyoming Supreme Court's decision on the Federal issue is conclusive and "will survive and require decision regardless of the outcome of future state-court proceedings," and since reversal by this Court on Question 1, herein, would preclude further litigation on the remanded issue. Acceptance of jurisdiction of this case in its present posture would be entirely consistent with the avoidance of piecemeal review, the avoidance of advisory opinions, and minimization of federal intrusion into state affairs. *North Dakota State Board of Pharmacy v. Snyders Drug Stores, Inc.*, 414 U.S. 156, 159 (1973).

[8] Initially, however, the United States claimed a more recent priority date for a reserved water right quantified to serve practicably irrigable acreage located on reacquired lands. Reply of the United States to Wyoming's Response to the Claims for Water Rights of the United States, September 4, 1980, p. 15: "All of the reserved water rights for the Wind River Indian Reservation have a priority date of 1868 *except* for those which are *for use of lands*

parties opposed all aspects of the reserved water right claims.[9] The United States, the Tribes, the State and most private parties opposed the claims of the remaining private parties that, as successors to Indian land owners, they also succeeded to a reserved water right. Appendices H, at p. 406a (¶ 12), G, at p. 283a.

REASONS FOR GRANTING THE WRIT

The Wyoming Supreme Court's judgment below decided several important federal questions in a way which conflicts with two decisions of this Court, with the principles announced in eight decisions of this Court, and with five decisions of the federal appeals courts. In addition, the Wyoming Supreme Court has decided important questions of federal law which have not been, but should be, settled by this Court. Those federal questions are important to the determination of water rights for forty-seven Indian reservations now being undertaken in nine western states, in which thirty-two general adjudications are now underway, involving a total of

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sold to non-Indians and later repurchased." (Emphasis added) Appendix F, at p. 224a.

[9] As recognized in the master's report, Appendix H, following the filing of claims by the United States and Tribes, the State and private parties asserted: (1) that no reserved water rights existed for this particular reservation, based on Congressional intent to obtain the Reservation's water rights under state law rather than by reservation (Question 1, herein), Appendix H, at pp. 404a, ¶ 2, 405a, ¶ 1, 431a, *et seq.*, *see also* State of Wyoming's Response to United States' and Tribes' Statements of Claim, July 16, 1980, p. 10, ¶¶ 5-6, hereinafter "State's Response;" (2) that any reserved water should be quantified based on the amount of water which was necessary to ensure that the Reservation's primary agricultural purpose was not entirely defeated in order to meet the Reservation's minimum needs and to provide a moderate standard of living for the Indians (Question 2, herein), Appendix H, at pp. 406a, ¶¶ 9-11, p. 411a, *et seq.*; *see also* State's Response, p. 11, ¶ 11, pp. 12-13, p. 23, ¶ 10; and (3) that any reserved right quantified based on practicably irrigable acres located on restored or reacquired lands should bear a priority as of the respective dates of restoration or reacquisition (Question 3, herein), Appendix H, at pp. 403-06a, ¶ 7, *see also* State's Response, p. 7, ¶ 7, pp. 20-22.

650,000 water right claims by 265,600 parties. Although only four adjudications of Indian reserved water rights have been resolved by negotiation and are awaiting Congressional ratification, the parties in other ongoing adjudications are actively attempting to compromise their differences. Guidance from this Court with respect to the important federal questions presented here will provide far greater certainty with respect to the reserved water right for Indian reservations and enhance judicial economy by expediting litigation and by facilitating successful negotiation.

I. EXISTENCE OF A RESERVED WATER RIGHT—When Congress expressly requires the acquisition of a reservation's water rights under state law, the judicial creation of an implied Federal reserved water right for the reservation is contrary to the intent of Congress and is in conflict with the principles announced by this Court.

In the water proviso of the 1905 Act, Congress expressly required that water rights for the Wind River Indian Reservation [10] be obtained "as required by the statutes of the State of Wyoming in securing water rights from said state." [11] Two unsuccessful attempts

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[10] A similar approach was taken for three other Indian reservations in the western United States. Congress has provided that water rights on the following Indian reservations, in addition to the Wind River Reservation, be obtained under applicable state law: Uintah, Uncompaghre and White River Ute, Utah, Act of June 21, 1906, 34 Stat. 325, 375, *see also* Act of March 3, 1909, 35 Stat. 812; Blackfeet, Montana; Act of March 1, 1907, 34 Stat. 1035; Fort Peck, Montana, Act of May 30, 1908, 35 Stat. 558, 560.

[11] The minutes of the negotiations leading to the 1904 Agreement, ratified by the 1905 Act, indicate that the Indians' spokesmen were concerned that as much money as possible from the proceeds of the cession be taken to "secure our water rights and make them good to us." Minutes of Council, Shoshone Agency, Wyoming, April 19, 1904, at 19, Wyo. Exh. WRIR I&P 8. In response, the United States' negotiator stated to the Indians that the water rights proviso and the money for funding the acquisition of water rights was to "secure the Indians' water rights so that

were made expressly to create Federal reserved water rights for the Reservation, one as part of the 1905 Act and one in 1914 since, according to the Commissioner of Indian Affairs, the water proviso had "practically nullified" Federal reserved water rights under *Winters, supra.*[12] The water proviso is fully consistent with other

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the white man cannot deprive you of water with which to irrigate your lands." Consequently, in the Water Proviso of the 1905 Act's Article III, Appendix X, at pp. 778-79a, Congress determined:

> [These funds] shall be devoted to surveying, platting, making of maps, payment of the fees, and the performance of such acts *as are required by the statutes of the State of Wyoming in securing water rights from said State* for the irrigation of such lands as shall remain the property of said Indians, whether located within the territory intended to be ceded by this agreement or within the diminished reserve. (emphasis supplied)

[12] Congress ratified the 1904 Agreement with the water proviso as described in note 11, above, in spite of the fact that the Indian Rights Association lobbied for the creation of an express limited reserved right. Wyo. Exh. WRIR I&P 6. To assure that water would be available to the Shoshone and Arapahoe allottees as against settlers coming to the opened lands, the Association, through the Secretary of the Interior, proposed a revised Article III to the 1904 Agreement which would have reserved waters on the Reservation from appropriation under Wyoming law until allotments were made on the diminished reservation. *See* United States House of Representatives, Report of the Committee on Indian Affairs, 58th Cong., 3rd Sess., January 19, 1905 at 7-9. The lobbying attempt failed due to the Senate Committee on Indian Affairs' concern that the proposed amendment would slow development of the ceded lands. United States Senate, Report of the Committee on Indian Affairs, 58th Cong., 3rd Sess., February 21, 1905, at 2; Wyo. Exh. WRIR I&P 7.

Later, in 1914, Congress passed an Indian Appropriation Act which provided, *inter alia*, for the appropriation of $25,000 to maintain, operate and complete canals within the Wind River Indian Reservation. 38 Stat. 582, 608, at sec. 24, Wyo. Exh. WRIR I&P 14. As the Act passed through Congress, however, there was an unsuccessful attempt to create an *express* reserved water right on behalf of the Wind River Reservation, and certain others. *See* United States Senate, Hearings before the Committee on Indian Affairs, March 12, 1914, at 279, Wyo. Exh. WRIR I&P 16. The reserved right proposed encompassed "the use of so much water as

pertinent federal legislation [13] and with Wyoming's admission to the Union.[14] Contrary to principles announced

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may be necessary to supply for domestic, stockwatering and irrigation purposes, land allotted or to be allotted to Indians on the *Wind River Reservation* or set aside for administrative purposes within said reservation." (emphasis added) *Id.*

The Office of Indian Affairs argued to Congress that, without the express reservation, Congress' appropriations would be put at substantial risk, for water rights on the reservations concerned, including Wind River, would be unprotected. United States House of Representatives, Hearings before a Subcommittee of the Committee on Indian Affairs, December 10, 1913, at 377-378, 707, Wyo. Exh. WRIR I&P 15; United States Senate, Hearings before Committee on Indian Affairs, March 12, 1914, at 280-281, Wyo. Exh. WRIR I&P 16. Commissioner Merritt reported to Congress that "*the very favorable decision of the Supreme Court in the Winters case regarding the water rights of Indians has been practically nullified by various acts of Congress, and as a result of such legislation, the water rights of Indians are now dependent on beneficial use in a number of reservations* where the Government has been, and is now, spending large amounts of reimburseable funds, *and by acts of Congress these water rights are subject to the laws of the several States wherein these irrigation projects are located.*" (emphasis added) United States House of Representatives, Hearings before a Subcommittee of the Committee on Indian Affairs, December 10, 1913, at 378, Wyo. Exh. WRIR I&P 15; United States Senate, *Id.* In spite of Commissioner Merritts' vigorous advocacy, the proposal to create an express reserved right failed.

[13] The water proviso of the 1905 Act is only one of many Congressional enactments relating to securing water rights for Indian reservations. As demonstrated by the water proviso and the legislation cited at note 10, above, Congress often elected to rely upon state law. *See also* note 12, above. Congress was not unaware, however, of its ability to reserve water expressly for reservation use, as other contemporaneous legislation reveals. *See* Act of March 6, 1906, 34 Stat. 53 (Yakima Reservation, Washington); Act of April 27, 1904, 33 Stat. 352 (Crow Reservation, Montana); Act of June 6, 1900, 31 Stat. 672 (Fort Hall Reservation, Idaho); Mission Indian Relief Act of 1891, 26 Stat. 712 (Mission Indians, California). Congress' election to provide for the acquisition of water rights on the Wind River Reservation under Wyoming law was part of a conscious pattern of Congressional action.

[14] This Court has ruled that Wyoming's admission to the Union impliedly terminated off-reservation hunting rights of the Wind

by this Court, the Wyoming Supreme Court has elected (1) to reject this express congressional requirement, (2) to hold that a reserved water right exists, by implication, for the Wind River Indian Reservation, and (3) to cancel, as contrary to that implied right, all existing State of Wyoming water right permits for the Reservation obtained under the direction of the water proviso. Appendix A, at pp. 25a-31a, 75a.

The decision of the Wyoming Supreme Court is in direct conflict with the principles announced in controlling decisions of this Court. When it expressly addresses the question of whether federal entities must abide by state water law, Congress almost invariably defers to state law. *United States v. New Mexico*, 438 U.S. 696, 701-702 (1978); *California v. United States*, 438 U.S. 645 (1978). A reviewing court may conclude that Congress intended to reserve water by implication only if "the purposes of the reservation would be entirely defeated" without the implication. *United States v. New Mexico*, 438 U.S. at 700. *See Arizona v. California*, 373 U.S. 546 (1963); *Winters v. United States*, 207 U.S. 564 (1908). Nevertheless, the Wyoming Supreme Court failed to honor this Court's explicit delineation of those circumstances giving rise to an implied reserved water right.[15] There was no effort below to determine whether,

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River Tribes expressly created by the 1868 Fort Bridger Treaty. *Ward v. Race Horse*, 163 U.S. 504 (1896). Congress' admission of Wyoming to the Union, somewhat uniquely, approved the Wyoming Constitution which declared state ownership of all waters within Wyoming and exclusively applied the appropriation doctrine in the state. Act of July 10, 1890, 26 Stat. 222. Wyo. Const. Art. VIII §§ 1 and 3, Appendix Z, p. 792a. While Wyoming's admission, of itself, may be insufficient to demonstrate the absence of an implied reserved water right for the Reservation, it is entirely consistent with Congress' enactment of the water proviso.

[15] The Master, whose decision on this point was accepted by the District Court, went so far as to hold that the "*Winters* decision rendered [the 1905 Act's water proviso] of no legal force or affect [sic] regarding securing state water rights." Appendix H, p. 638a, ¶ 8.

by the water proviso and the resultant acquisition of state water rights, Congress had intended to fulfill—and had succeeded in fulfilling—the agricultural purpose of the Wind River Indian Reservation. As is apparent from the decision of the Wyoming Supreme Court, Appendix A, pp. 25a-31a, and from the Report of the Master, Appendix H, at p. 642a, paragraph 19, Wyoming was assigned the burden of proving that a reserved water right for the Reservation did *not* exist. No evidence was presented by the United States or the Shoshone and Arapaho Tribes that, absent the implication of the vast reserved water right decreed below, reliance upon the Reservation's substantial state water rights alone would prevent its agricultural purpose from being "entirely defeated." [16] Indeed, after eighty years of full agricultural development, the water requirements of the Reservation were only slightly more than one-half of the reserved water right awarded below.

The decision of the Wyoming Supreme Court is also in conflict with this Court's decisions regarding the termination of Indian treaty rights. If the United States impliedly intended to create a reserved water right on behalf of the Wind River Indian Reservation in 1868, it

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[16] The decision of the Wyoming Supreme Court is also inconsistent with the decisions of the Ninth Circuit Court of Appeals which, most recently relying upon this Court's decision in *New Mexico*, have consistently called for a determination that water is necessary to fulfill the essential purposes of a reservation before implying the existence of a reserved water right. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 46-47 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981); *United States v. Adair*, 723 F.2d 1394, 1408 (9th Cir. 1983), *cert. denied, Oregon v. United States*, 467 U.S. 1252 (1984); *United States v. Walker River Irrigation District*, 104 F.2d 334, 336-340 (9th Cir. 1939). While these decisions have declared the existence of an implied reserved water right, none of the Courts was faced with a Congressional enactment applying state law on the reservation at issue. The Wyoming Supreme Court's decision differs from these, however, by the absence of a careful examination of the necessity of the implied right to prevent reservation purposes from being entirely defeated, as demanded by *New Mexico*.

was terminated by the express language of the water proviso in 1905. The Wyoming Supreme Court's discussion of this issue is so sparce as to make it impossible to determine the standards which that court may have applied. Those standards were elaborated by this Court in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) ("*Rosebud*") which indicates that termination of Indian treaty rights by subsequent legislation may be found on the face of the legislation, in its legislative history, or in the circumstances surrounding its enactment. Most recently, in *United States v. Dion*, 476 U.S. 734 (1986), this Court stated that the legislative history of congressional action will be most persuasive if the intent to terminate Indian rights can clearly and reliably be found in the legislative history of a statute. In its holding on the termination issue, Appendix A, at pp. 31a-32a, the Wyoming Supreme Court failed even to address the fact that Congress carefully considered and refused to enact a limited reserved water right for the Wind River Indian Reservation.[17] *See* note 12, *supra*.

The lower court simply failed to assign any meaning or purpose to the water proviso or to the thorough and successful state water right acquisition program conducted under it. The Wyoming Supreme Court held that the water proviso and its legislative history were "no indication" of Congress' intent with respect to the existence of reserved water rights on the Reservation, without so much as alluding to what conceivable contrary

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[17] The Wyoming Supreme Court made no analysis of the continued necessity of the implied reserved water right in the face of the express 1905 legislation providing for the acquisition of Wyoming water rights for the Reservation. This Court's decisions, making it clear that *need* is the fulcrum upon which the implication of a reserved water right is balanced, lead to the conclusion that when the needs of a reservation are met by express federal reliance upon state law, deference to state law should supersede the continued existence of any previously created implied reserved water right. *United States v. New Mexico*, *supra*, at 701-702.

purpose Congress might have had. Appendix A, p. 29a. This Court has instructed, in construing an Indian termination act, that a federal statutory proviso should not be interpreted to give it a meaning that will amount to its rejection. *United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498, 508 (1913).

This Court should accept certiorari to correct the lower court's failure to adhere to this Court's decisions, to resolve this significant question of first impression affecting the Wind River and three other reservations, and to assign a meaning and purpose to a federal statute which the Wyoming courts have elected to write into oblivion.

II. QUANTIFICATION OF THE RESERVED WATER RIGHT—The Wyoming Supreme Court's quantification of a Federal reserved water right, in the absence of any demonstrated necessity for the water, is in conflict with the principles announced by this Court and the decisions of the Ninth Circuit.

The appropriate quantification standard for reserved water rights of an agricultural Indian reservation is an important question of federal law which has not been, but should be, settled by this Court. The Wyoming court's award of a reserved water right is based solely on an amount of practicably irrigable acreage which is far in excess of the Wind River Reservation's abundant historically irrigated acreage. In addition, the award was made without evidence that additional water was necessary to prevent the defeat of the Reservation's agricultural purpose. In these two respects, the Wyoming Supreme Court's decision is in conflict with the principles announced by this Court and in conflict with the decisions of the Ninth Circuit federal court of appeals.

A. *The appropriate standard of quantification for the reserved water rights of agricultural Indian reservations is an important question of federal law which has not been, but should be, settled by this Court.*

When it first addressed this question, this Court concluded that the reserved water right for certain agricultural Indian reservations included "enough water . . . to irrigate all the practicably irrigable acreage" on the reservation. *Arizona v. California*, 373 U.S. 546, 600-601 (1963), hereinafter *Arizona I*. Those reservations, however, had been set aside for the future requirements of unknown tribes. *Report, Simon H. Rifkind, Special Master*, December 5, 1960, pp. 262-63. The Court rejected Arizona's contention that the amount of the reserved water right should be measured by the Indians' "reasonably foreseeable needs." During the next fifteen years, however, the Court began to view quantification quite differently. By 1978, the Court concluded that the reserved right included only enough water to ensure that the primary purpose of the reservation was not "entirely defeated." *United States v. New Mexico*, 438 U.S. 696, 700 (1978), hereinafter *New Mexico*, *c.f. Cappaert v. United States*, 426 U.S. 128, 141 (1976), hereinafter *Cappaert*, (approving only an amount necessary for the reservation's "minimal need"). Those subsequent cases, to be sure, dealt with reservations other than Indian reservations. Nevertheless, in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979), hereinafter *Fishing Vessel*, the Court firmly stated that the principle in quantifying Indian rights to natural resources is to provide the Indians with a moderate standard of living.[18] Finally, the *Ari-*

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[18] "As in *Arizona v. California* and its predecessor cases, the central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living." *Fishing Vessel, supra*, 443 U.S. at 686.

zona I dispute was again addressed by this Court in *Arizona v. California*, 460 U.S. 605 (1983), hereinafter *Arizona II*, in which the United States and Tribes sought an increase in their reserved water right. The States, on the other hand, suggested that the Court should reconsider the "practicably irrigable acreage" standard. To preserve the certainty of its previous decree *in that case*, this Court refused to reopen the quantification issue.[19]

The inevitable resulting question left for the lower courts, of course, is whether "practicably irrigable acreage" is simply *res judicata* as to the reservations in *Arizona I* and *II* or whether it is the sole quantification standard for *all* agricultural Indian reservations, including those which were set aside for a specific tribe. For example, at the urging of the United States, the Claims Court recently hedged its bets in concluding that "practicably irrigable acreage" *is* the standard, *but* that the standard is now subject to a "restrictive interpretation" based on concepts of necessity. *White Mountain Apache Tribe of Arizona v. United States*, 11 Cl. Ct. 614, 626 (1987).[20] The Wyoming Supreme Court, on the other

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[19] "We also fear that the urge to relitigate, once loosed, will not be easily cabined. The States have already indicated, if the issue were reopened, that the irrigable-acreage standard itself should be reconsidered in light of our decisions in [*New Mexico, supra, Fishing Vessel, supra*], and we are not persuaded that a defensible line can be drawn between the reasons for reopening this litigation advanced by the Tribes and the United States on the one hand and the States on the other. It would be counter to the interests of all parties to this case to open what may become a Pandora's Box, upsetting the certainty of all aspects of the decree. These considerations, combined with the practice in our original cases and the strong res judicata interests involved, lead us to conclude that the irrigable-acreage question should not be relitigated." *Arizona II, supra*, 460 U.S. at 625-626.

[20] "The term 'practicably irrigable acreage' is now recognized as the quantification of a tribe's Winters Doctrine rights. However, more recent Supreme Court decisions manifest a restrictive interpretation of that measure. [*Cappaert, supra*], stated that *Winters* had held that a reservation of water rights sufficient to accomplish

hand, analyzed this Court's decisions, failed to find any such "restrictive interpretations," and concluded that *Arizona II* conclusively reaffirmed the original "practicably irrigable acreage" standard announced in *Arizona I*, without regard to any concepts of necessity.[21]

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the purpose of the reservation is made when the Government reserves land for a reservation or other federal enclave. *Cappaert* went on to state boldly: 'The implied-reservation-of-water rights doctrine, . . . reserves only that amount of water necessary to fulfill the purpose of the reservation, no more.' 426 U.S. at 141, 96 S.Ct. at 2070 (citing [*Arizona I, supra*]). The law is now settled that "Congress reserved 'only that amount of water necessary to fulfill the purpose of the reservation, no more.'" [*New Mexico, supra*, 438 U.S. 696, 700] (quoting *Cappaert* and *Arizona v. California*). The Supreme Court in [*New Mexico, supra*] ventured a step further:

> Each time this court has applied the "implied-reservation-of-water doctrine," it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purpose of the reservation would be *entirely defeated.*

"438 U.S. at 700, 98 S.Ct. at 3014 (emphasis added).

"In the later case of [*Arizona II, supra*], the extent of the reservation of water rights was described as 'an allotment of water necessary to' make the reservation liveable." 460 U.S. at 616, 103 S.Ct. at 1389 [quoting *Arizona I, supra*, 373 U.S. at 599-600]." *White Mountain, supra*, 11 Cl. Ct. 626.

[21] Appendix A, at 47a: "The measure of the Tribes' reserved water right is the water necessary to irrigate the practicably irrigable acreage on the reservation. In [*Arizona I*], a needs test was rejected as too uncertain, the Court opting instead for practicably irrigable acreage as the measure of a tribal agricultural reserved water right. Two subsequent non-Indian reserved water right cases [*Cappaert, New Mexico*] indicate that necessity is the measure of a reserved water right. And in [*Fishing Vessel*], the Court recognized the propriety of reducing the Indians' proportion of the fish harvest as their needs diminished. Nonetheless, the Court declined the invitation to re-examine the PIA standard in [*Arizona II*] and reaffirmed the value of the certainty inherent in the practicably irrigable acreage standard. The district court was correct in quantifying the Tribes' reserved water right by the amount of water necessary to irrigate all of the reservation's practicably irrigable acreage."

There can be no doubt that the general quantification standard is uncertain in the minds of the lower courts.

In the absence of clarification and resolution by this Court, the confusion already apparent in the lower courts will inevitably expand. The question of the proper standard of quantification for Indian reserved water rights has already caused much confusion and much hope for clarification among the commentators. Some writers strongly support the general application of the PIA standard.[22] Still others have blamed the lack of quantification of many tribal water rights upon the unsettled state of the law by which quantification will be governed.[23] Regardless of the assistance the commentators may attempt to provide on the issue, probably the most apparent result of their many inquiries is to document the confusion regarding what standard governs the quantification of tribal reserved water rights.[24]

The quantification standard for this important federal water right should be clear and uniform throughout the western states. This Court should either affirm the practicably irrigable acreage standard or clarify appli-

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[22] Collins, *Indian Allotment Water Rights*, 20 Land and Water Law Review 421, 427-428 (1985). Others have criticized PIA and called for reliance upon other standards. Note, *A Proposal for the Quantification of Reserved Indian Water Rights*, 74 Columbia L. Rev. 1299, 1311-1314 (1974).

[23] Florio, *Water Rights: Enforcing the Federal Indian Trust After Nevada v. United States*, 13 Am. Indian L. Rev. 79, 80 (1985).

[24] *See*, for example, Collins, *The Future Course of the Winters Doctrine*, 56 Colo. L. Rev. 481, 484 (1985); *Brookshire, et al., Economics and the Determination of Indian Reserved Water Rights*, 23 Nat. Res. J. 749, 763-764 (1983); Comment, *Indian Reserved Water Rights: The Winters of Our Discontent*, 88 Yale L. J. 1689, 1694-1699 (1979); Comment, *Federal Reserved Rights in Water: The Problem of Quantification*, 9 Texas Tech. L. Rev. 89, 99-101 (1977); Comment, *Application of the Winters Doctrine: Quantification of the Madison Formation*, 21 S.D. L. Rev. 144, 150-155 (1976); Note, *The Irrigable Acres Doctrine*, 15 Nat. Res. J. 375, 379-384 (1975).

cation of the rapidly evolving necessity standard for use in quantifying the reserved water right of agricultural Indian reservations.

B. *The Wyoming Supreme Court's award of a reserved water right in an amount far in excess of that historically used after full irrigation development is in conflict with decisions of the Ninth Circuit federal court of appeals.*

The reserved water right awarded by the Wyoming Supreme Court was quantified for practicably irrigable acreage far in excess of the land historically irrigated on the Reservation after over eighty years of intensive water development. As a result, the decision of the Wyoming Supreme Court is in conflict with the decisions of the Ninth Circuit federal court of appeals in *United States v. Walker River Irrigation District*, 104 F.2d 334 (9th Cir. 1939), hereinafter *Walker River*, and *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956), *cert. denied, Ahtanum Irrigation District v. United States*, 352 U.S. 988 (1957), hereinafter, *Ahtanum*.

The Wind River Reservation in Wyoming enjoys a history of extensive irrigation development pursuant to state awarded water rights, unlike the reservations in *Arizona I, supra*.[25] Between 1905 and 1915 some 145,000 acres of land of the Wind River Reservation were awarded state water rights for the benefit of the Indians. This amount of irrigated land soon proved to be far more than was needed. By 1963, state water rights for 40% of that land had been voluntarily cancelled, leaving 87,000 acres under state water rights. Based on the practicably irrigable acreage standard, however, the Res-

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[25] Master's Report, *Arizona v. California*, December 5, 1960, p. 256. In contrast to the Wind River Reservation, the five reservations in *Arizona I* were not set aside and developed for a particular tribe but, instead, were established for the future use of unknown tribes. *Id.*, p. 262. In fact, irrigation was "not practiced" on the Chemehuevi Reservation, *id.*, p. 86, and was "negligible" on the Fort Mohave Reservation. *Id.*, p. 85.

ervation's reserved water rights were quantified based on 103,000 acres of irrigable acreage, of which only 54,200 acres had been historically irrigated. In other words, after the infusion of massive amounts of congressionally mandated expenditures for the construction of irrigation projects under Wyoming law, the historic practicably irrigable land base of the reservation was 54,200 acres, requiring some 290,500 acre feet of water annually.[26] Nevertheless, under the Wyoming Supreme Court's decision below, the reserved water right awarded was 500,400 acre feet[27] or 72% greater than historical needs. This windfall was awarded in the absence of any evidence showing that the additional water was essential to meet the minimum needs of the Reservation or to accomplish its agricultural purpose.

The Ninth Circuit has twice addressed the quantification standard for the reserved water right for an agricultural Indian reservation on which there has been a history of irrigation development. On the Walker River Indian Reservation in Nevada, there had been no showing of "the *necessity* or demand for the cultivation of a larger area than 2,100 acres," for which 26.25 second feet of water was found to be sufficient. *Walker River*

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[26] Historic practicably irrigable acres and the reserved water right based thereon were: 37,284 acres and 16,932 acres for which 207,641 acre feet and 82,849 acre feet were awarded, Appendix D, at pp. 172a, 182a, for a total of 54,221 acres of historic land for which 290,490 acre feet were awarded a Federal reserved water right.

[27] Future practicably irrigable acreage and the reserved water right based thereon awarded by the district court were: 48,097 acres and 423 acres for which 186,990 acre feet and 1,947 acre feet were awarded, Appendix D, at pp. 172a, 182a, for a total of 48,520 acres of future land for which 188,937 acre feet were awarded as a reserved water right by the district court. The Wyoming Supreme Court reversed a 10% reduction of the future award by the district court. Appendix A, at pp. 56-58, thereby increasing the district court's award by 20,993 to 209,930 acre feet. The total award by the Wyoming Supreme Court, for both historic and future acreage, was 500,420 a.f.

supra, 104 F.2d at 340. The Ninth Circuit consequently limited the reserved water right to that precise amount "as a fair measure of the needs of the government as demonstrated by seventy years' experience." *Id.*, at pp. 339-40.[28] On the Yakima Indian Reservation in the State of Washington, the United States entered into an agreement with neighboring non-Indian irrigators in 1908 which limited the Indians' use of water from Ahtanum Creek. The Ninth Circuit in *Ahtanum*, *supra*, 236 F. 2d at 337, felt constrained to uphold the validity of the agreement but, nevertheless, described the Indians reserved water right as being in that amount required to provide for the Indian's reasonable needs, as measured upon the completion of the Reservation's water project.[29]

These two Ninth Circuit opinions are in direct conflict with that of the Wyoming Supreme Court, below, which granted a reserved water right 72% greater than the water needed by the Tribes after eighty years of

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[28] The Ninth Circuit stated: "We hold that there was an implied reservation of water to the extent reasonably necessary to supply the needs of the Indians. There remains for decision the question as to the quantity to which the United State is entitled. The problem is one of great practical importance, and a priori theories ought not to stand in the way of a practical solution of it. The area of irrigable land included in the reservation is not necessarily the criterion for measuring the amount of water reserved, whether the standard be applied as of 1859 or as of the present. The extent to which the use of the stream might be necessary could only be demonstrated by experience. . . . We are constrained to accept this estimate [26.25 c.f.s.] as a fair measure of the needs of the Government as demonstrated by seventy years' experience. . . . So precious is every miner's inch of water in these parched regions that no arrangement should be countenanced which would encourage waste or tend to induce it." *Walker River*, *supra*, 104 F.2d at 339-40.

[29] The Ninth Circuit stated: ". . . the implied reservation of the waters of this stream extended to so much thereof as was required to provide for the reasonable needs of the Indians, not merely as those needs existed in 1908, but *as they would be measured in 1915, when the Indian ditch system has been completed.*" (emphasis added) *Ahtanum*, *supra*, 236 F.2d at 337.

extensive irrigation development and the apparent conclusion of irrigation development. Creation of such an excess simply means that reserved right water will be placed to secondary uses, rather than the Reservation's primary purpose, in violation of the Court's admonition in *New Mexico*, *supra*, 438 U.S. at 700.[30] Consequently this Court should determine the question of whether the reserved water right, for an agricultural Indian reservation with a long-established history of irrigation, may exceed the Reservation's historical needs.

III. PRIORITY DATE OF THE RESERVED WATER RIGHT—The Wyoming Supreme Court's award of an original priority date, for land ceded from the reservation and later restored or reacquired, is in conflict with the decisions of this Court and those of the Ninth Circuit.

The judgment of the Wyoming Supreme Court, below, is in direct conflict with the recent decisions of this Court establishing the circumstances under which Indian reservations are disestablished, the termination of Indian rights in the ceded lands upon disestablishment, and

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[30] For example, as claimed, the reserved water right included instream flows of up to 6,000 c.f.s. for fisheries, wildlife and aesthetic purposes, an amount which would completely curtail all upstream diversions. This claim was denied and the United States and Tribes sought to amend the judgment in that regard. Although the proposed amendment was rejected, the district court held that once the reserved water right is quantified for irrigation, it arguably may be used for virtually any purpose on the Reservation so long as the consumptive use is not increased. Amended Judgment and Decree, May 24, 1985, Appendix D, at p. 183a. *See also* Order Ruling on Motions to Alter or Amend the Decision of May 10, 1983, Appendix E, at p. 194a. While the prohibition on any increased consumptive use may appear to be ample protection, it is important to remember that new uses may be non-consumptive, yet quite injurious to other users. For example, if the Tribes convert their reserved water right into the very fisheries flows for which a reserved water right was rejected, those fisheries flows would have the effect of eliminating diversions by other water users above and within the Reservation. Appendix F, at pp. 259-60a.

reserved water right priority dates for lands added to a reservation. *Rosebud, supra; Oregon v. Klamath*, 473 U.S. 753 (1985), hereinafter *Klamath*, conflict in principle only; and *Arizona II, supra.* In addition, the Wyoming Supreme Court's decision is in conflict with the decisions of the Ninth Circuit court of appeals regarding the priority date of a reserved water right associated with former reservation lands which are restored to the reservation, *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984), hereinafter *Anderson*, or which are reacquired by or on behalf of Indians. *Colville v. Walton*, 647 F.2d 42 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981), hereinafter *Walton II.*

A. *The grant of an original priority date for public lands which were later restored to the reservation is in conflict with the principles announced by and the decisions of this Court in Rosebud, Klamath and Arizona II.*

The Wyoming Supreme Court affirmed an 1868 reserved water right quantified for 40,300 practicably irrigable acres which were ceded by the Wind River Reservation Tribes in 1905 and restored ("added to and made a part of" the Reservation) from 1940 to 1974 by the United States to satisfy the Tribes' needs for additional "grazing land." *See* note 2, *supra.* The Wyoming Supreme Court did not discuss the basis for its decision and the district court simply concurred "with the conclusion of the special master that this land was held in trust for the Tribes by the United States and never lost its Indian status." Appendix F, p. 225a. The master's conclusion was based on *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920), hereinafter *Ash Sheep*, involving the Crow Reservation in Montana, as well as the Water Proviso in Article III and preservation of other benefits in Article X of the 1905 Act. Appendix X, at pp. 778-79a, 774a. In brief, the master concluded that the Indian's retention of an interest in the proceeds of the sale or the lease of ceded lands precluded a disestablishment of those lands under *Ash Sheep*

as did the omission of the word "convey" under *Rosebud* and the protection of all other rights under Article X of the 1905 Act.

On all counts, the reasoning below was in conflict with the principles announced by this and other courts. Reliance on *Ash Sheep* is misplaced in that the relevant portion of the Crow Reservation involved in that case was later held to be disestablished in *Little Light v. Crist*, 649 F.2d 682 (9th Cir. 1981). Reliance on the omission of the word "convey" in the 1905 Act overlooks the use of "conveyed" in Article II of the Act and violates the principles of *Rosebud*, *supra*, in which this Court held that the Rosebud Sioux Reservation had been partially disestablished under circumstances virtually identical to those surrounding the Wind River Reservation in 1905. Reliance on the savings provision in Article X of the 1905 Act is in direct conflict with the decision in *Klamath*, *supra*, in which an identical provision was held to reserve no implied rights to the Tribes in the ceded lands. Finally, the award of an original priority date based on land subsequently "added to" the Reservation is in direct conflict with the holding in *Arizona II*, *supra*, 460 U.S. at 641.

Acting in defiance of the principles and decisions announced by this Court, the Wyoming court found that the reserved water right for the ceded lands survived their cession in 1905 and were entitled to an original priority date of 1868, rather than a priority as of the date those lands were "added to and made a part of" the Reservation.

B. *The grant of an original priority date for public lands which had been conveyed to non-Indians, then later reacquired by the Indians is in conflict with the decision of the Ninth Circuit in Anderson.*

The Wyoming Supreme Court awarded an 1868 reserved water right based on practicably irrigable lands which had been ceded to the United States, conveyed to non-Indians under the public land laws, and then

reacquired by or on behalf of Indians. Such an award is in direct conflict with the Ninth Circuit's decision in *Anderson, supra*, 736 F.2d at 1361-62. In that case, the Ninth Circuit held that water rights appurtenant to reacquired homesteaded lands carry a priority determined by state law and that the reserved water right for homesteaded lands without a perfected state water right bear a priority as of the date of reacquisition.

C. *The grant of an original priority date for lands which were allotted to individual Indians, conveyed to non-Indian grantees, and reacquired by or on behalf of the Indians, is in conflict with the decisions of the Ninth Circuit in Anderson and Walton II.*

In *Walton II, supra*, 647 F.2d 42, at 51, the Ninth Circuit held that a non-Indian owner of an original Indian allotment does obtain a reserved water right, although it may be lost by the non-Indian's non-use. In *Anderson, supra*, 736 F.2d at 1361-62, the Ninth Circuit held that, upon reacquisition of the allotment, the Tribes obtain a reserved right with an original priority date only if the non-Indian grantor has not lost the right through non-use. The Wyoming decision, below, however, granted an 1868 priority date and required no showing that the reserved right continued to be used by the intervening non-Indian owner(s). Appendix A, p. 72-75a.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

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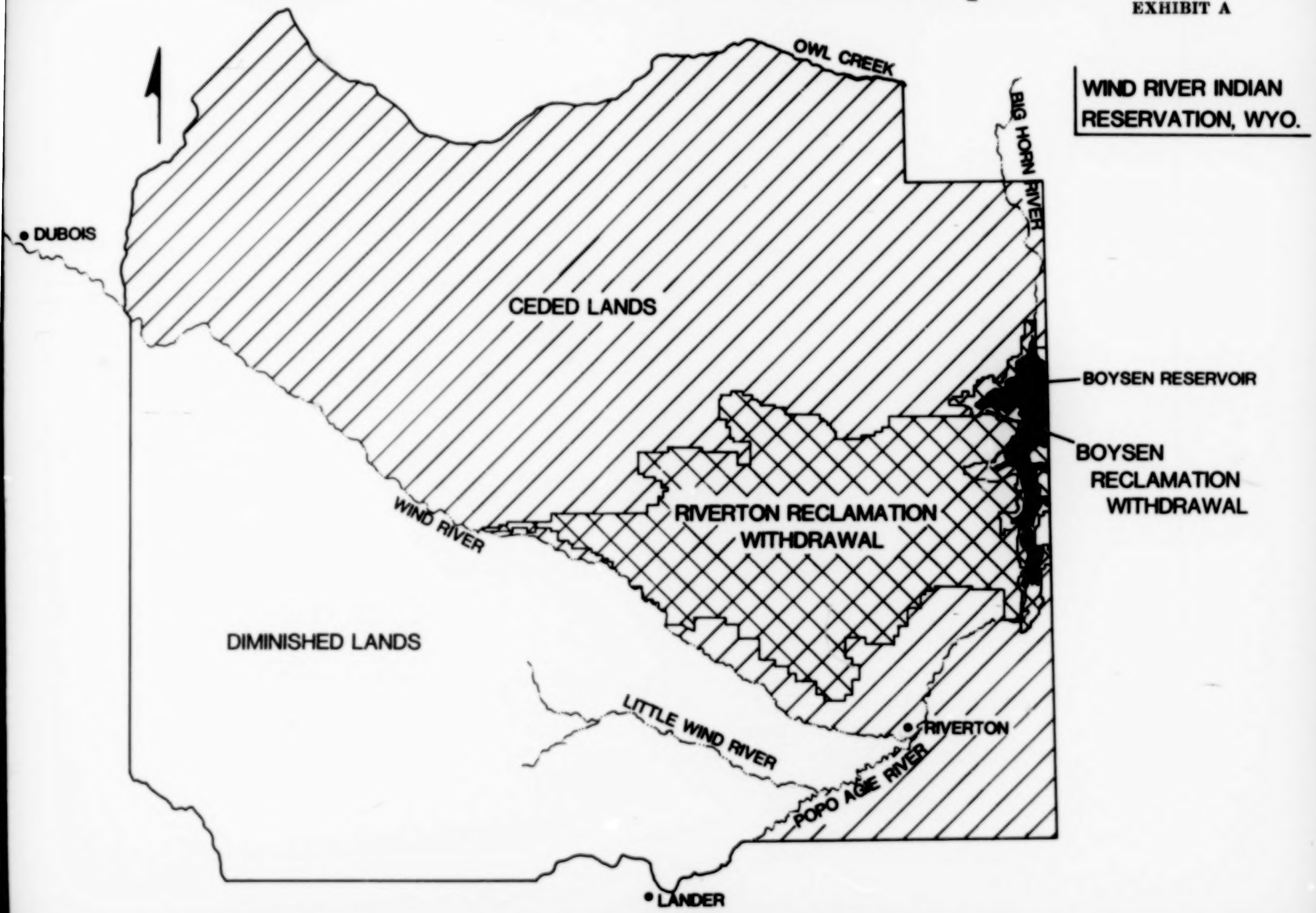
August 19, 1988

EXHIBIT A


WIND RIVER INDIAN RESERVATION, WYO.
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BIG HORN RIVER
DUBOIS
CEDED LANDS
BOYSEN RESERVOIR
BOYSEN RECLAMATION WITHDRAWAL
RIVERTON RECLAMATION WITHDRAWAL
WIND RIVER
DIMINISHED LANDS
LITTLE WIND RIVER
RIVERTON
POPO AGIE RIVER
LANDER

88-309

No. 88-

Supreme Court, U.S.
FILED
AUG 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF WYOMING,

Petitioner,

v.

UNITED STATES OF AMERICA, SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, *et al.*,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

VOLUME I
(Pages 1a-366a)

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IN THE SUPREME COURT, STATE OF WYOMING

OCTOBER TERM, A.D. 1987

February 24, 1988

No. 85-203

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE BIG HORN RIVER SYSTEM AND ALL OTHER SOURCES, STATE OF WYOMING.

THE STATE OF WYOMING,

Appellant,

v.

OWL CREEK IRRIGATION DISTRICT MEMBERS; SHOSHONE AND ARAPAHOE TRIBES; LANDIS WEBBER and BARBARA WEBBER, individually and on behalf of Red Creek Cattle Company, BERTHA JONES and GRACE GRABOSKI; UNITED STATES; CITY OF RIVERTON, MIDVALE IRRIGATION DISTRICT, and RIVERTON VALLEY IRRIGATION DISTRICT,

Appellees.

No. 85-204

OWL CREEK IRRIGATION DISTRICT MEMBERS,

Appellants,

v.

THE STATE OF WYOMING, SHOSHONE AND ARAPAHOE TRIBES; LANDIS WEBBER and BARBARA WEBBER, individually and on behalf of Red Creek Cattle Company,

BERTHA JONES and GRACE GRABOSKI; UNITED STATES; CITY OF RIVERTON, MIDVALE IRRIGATION DISTRICT, and RIVERTON VALLEY IRRIGATION DISTRICT,

Appellees.

No. 85-205

SHOSHONE AND ARAPAHOE TRIBES,

Appellants,

v.

THE STATE OF WYOMING, OWL CREEK IRRIGATION DISTRICT MEMBERS, LANDIS WEBBER and BARBARA WEBBER, individually and on behalf of Red Creek Cattle Company, BERTHA JONES and GRACE GRABOSKI; UNITED STATES; CITY OF RIVERTON, MIDVALE IRRIGATION DISTRICT, and RIVERTON VALLEY IRRIGATION DISTRICT,

Appellees.

No. 85-217

LANDIS WEBBER and BARBARA WEBBER, individually and on behalf of Red Creek Cattle Company, BERTHA JONES and GRACE GRABOSKI,

Appellants,

v.

THE STATE OF WYOMING; OWL CREEK IRRIGATION DISTRICT MEMBERS; SHOSHONE and ARAPAHOE TRIBES; UNITED STATES; CITY OF RIVERTON, MIDVALE IRRIGATION DISTRICT, and RIVERTON VALLEY IRRIGATION DISTRICT,

Appellees.

No. 85-218

CITY OF RIVERTON, MIDVALE IRRIGATION DISTRICT, and RIVERTON VALLEY IRRIGATION DISTRICT,

Appellants,

v.

THE STATE OF WYOMING; OWL CREEK IRRIGATION DISTRICT MEMBERS; SHOSHONE and ARAPAHOE TRIBES; LANDIS WEBBER and BARBARA WEBBER, individually and on behalf of Red Creek Cattle Company, BERTHA JONES and GRACE GRABOSKI; UNITED STATES,

Appellees.

No. 85-225

UNITED STATES,

Appellant,

v.

THE STATE OF WYOMING, OWL CREEK IRRIGATION DISTRICT MEMBERS; SHOSHONE and ARAPAHOE TRIBES; LANDIS WEBBER and BARBARA WEBBER, individually and on behalf of Red Creek Cattle Company, BERTHA JONES and GRACE GRABOSKI; UNITED STATES; CITY OF RIVERTON, MIDVALE IRRIGATION DISTRICT, and RIVERTON VALLEY DISTRICT; ALBERT HORNECKER and HORNECKER LIVESTOCK CO., INC., DONALD BATH and DHB & CO., and PLB & CO., BRADFORD BATH, GRIFFIN BROTHERS, INCORPORATED, RALPH FLOYD URBIGKIT, CHARLES RICHARDSON and RICHARD and ELSIE MARTIN, all non-Indian parties,

Appellees.

No. 85-226

ALBERT HORNECKER and HORNECKER LIVESTOCK CO., INC., DONALD BATH and DHB & CO., and PLB & CO., BRADFORD BATH, GRIFFIN BROTHERS, INCORPORATED, RALPH FLOYD URBIGKIT, CHARLES RICHARDSON and RICHARD and ELSIE MARTIN, all non-Indian parties,

Appellants,

v.

THE STATE OF WYOMING, OWL CREEK IRRIGATION DISTRICT MEMBERS; SHOSHONE and ARAPAHOE TRIBES; UNITED STATES; LANDIS WEBBER and BARBARA WEBBER, individually and on behalf of Red Creek Cattle Company, BERTHA JONES and GRACE GRABOSKI; CITY OF RIVERTON, MIDVALE IRRIGATION DISTRICT, and RIVERTON VALLEY IRRIGATION DISTRICT,

Appellees.

No. 85-236

ROBERT W. HARVEY and OLGA J. HARVEY, MARY O. AHLBORN, OWEN BARNETT and EVA M. BARNETT, BLACK BUTTE LIVESTOCK COMPANY, CAMPBELLS, INC., PHYLLIS L. CRANDALL and KENNETH WARD CRANDALL, BILLY M. and BARBARA J. DANIELS, CARL DOCKERY and CAROL DOCKERY, CLYDE R. FISHER and GLORIA A. FISHER, CHARLES GOLDBEN, GARY V. KELLOGG and BRENDA JOYCE KELLOGG, RUSSELL E. LONG and IRENE M. LONG, WILLIAM A. MATTHEWS, ARTHUR D. MCCUMBER, MARVIN W. MEYER and ERNESTINE S. MEYER, VERN NELSON and CAROLYN R. NELSON, NORWEST BANK OF OMAHA N.A., NORRIS EDWIN ODDE and F. LOUISE ODDE, WILLIAM OKIE, KENNETH and IONA OUTLAND, SYLVIA PAULSEN, JERRY D. REDDING and SHELIA C. REDDING, RED LANE WATERSHED IMPROVEMENT DISTRICT, C. DUANE RUSH and KATHERINE C. RUSH, BRIAN F. SANFORD and KATHLEEN SANFORD, NORMAN L. SANFORD, NEWELL S. SESSIONS and DAISY E. SESSIONS, BARBARA SMITH, ROBERT STEWART, TOWN OF EAST THERMOPOLIS, VE BAR LIVESTOCK COMPANY, RAYMOND C. and DELORES J. WEESE, and RUTH CLARE YONKEE,

Appellants,

v.

THE STATE OF WYOMING, UNITED SATES; OWL CREEK IRRIGATION DISTRICT MEMBERS; SHOSHONE and ARAPA-

HOE TRIBES; LANDIS WEBBER and BARBARA WEBBER, individually and on behalf of Red Creek Cattle Company, BERTHA JONES and GRACE GRABOSKI; UNITED STATES; CITY OF RIVERTON, MIDVALE IRRIGATION DISTRICT, and RIVERTON VALLEY IRRIGATION DISTRICT; ALBERT HORNECKER and HORNECKER LIVESTOCK CO., INC., DONALD BATH and DHB & Co., and PLB & Co., BRADFORD BATH, GRIFFIN BROTHERS, INCORPORATED, RALPH FLOYD URBIGKIT, CHARLES RICHARDSON, and RICHARD and ELSIE MARTIN, all non-Indian parties,

Appellees.

Appeal from the District Court of Laramie County
The Honorable Alan B. Johnson, Judge

Joseph B. Meyer, Attorney General; S. Jane Caton, Assistant Attorney General; Steven F. Freudenthal, Special Assistant Attorney General, with Freudenthal, Freudenthal, Salzburg, Bonds & Rideout, Cheyenne; Houston G. Williams, Special Assistant Attorney General, with Williams, Porter, Day & Neville, Casper; Michael D. White and David F. Jankowski, Special Assistant Attorneys General, with White and Jankowski, Denver, Colorado; and Randall T. Cox, Special Assistant Attorney General, with Omohundro and Palmerlee, Buffalo, for State of Wyoming. Argument presented by Michael D. White, for Type 1 and 2 Claims, and Randall T. Cox for Type 1, 2 and 3 Claims; also present at counsel table were A. G. McClintock, Wyoming Attorney General, and S. Jane Caton, Assistant Attorney General.

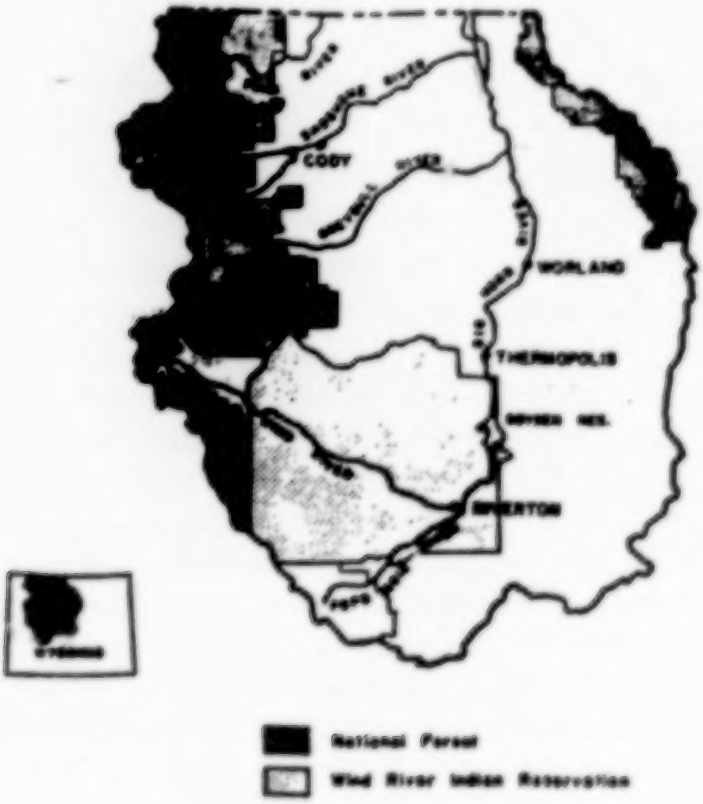
Ruth Clare Yonkee, Thermopolis, for Red Lane Watershed Improvement District, Town of East Thermopolis; C. Edward Webster, II, Cody, for Owl Creek Irrigation District; Donald P. White of White & White, Riverton, for City of Riverton, Midvale Irrigation District and

Riverton Irrigation District; Kenneth Guido, Jr., Washington, D.C. for Shoshone Tribe; W. Richard West, Jr. and Susan M. Williams of Fried, Frank, Harris, Shriver & Jacobson, Washington, D.C., and B. Kevin Gover and Susan M. Williams of Gover, Williams & Stetson, Albuquerque, New Mexico, and Thomas W. Fredericks, Dale T. White, and Robert S. Pelcyger of Fredericks & Pelcyger, Boulder, CO, and William J. Thomson and W. Perry Dray of Dray, Madison & Thomson, Cheyenne for Shoshone and Northern Arapahoe Tribes; Michael S. Messenger of Messenger & Jurovich, Thermopolis, for Landis Webber and Barbara Webber, individually and on behalf of Red Creek Cattle Company, Bertha Jones and Grace Graboski; F. Henry Habicht II, Assistant Attorney General and James J. Clear, Department of Justice, Washington, D.C. for United States, Sky D Phifer of Phifer & Phifer, Lander, for Albert Hornecker and Hornecker Livestock Co., Inc., Donald Bath and DHB & Co., and PLB & Co., Bradford Bath, Griffin Brothers, Inc., Ralph Floyd Urbigkit, Charles Richardson and Richard and Elsie Martin; Ross D. Copenhaver of Copenhaver, Kahl & Kath, Powell, for Willwood Irrigation District and Deaver Irrigation District. Oral argument presented by Robert S. Pelcyger for Arapahoe Tribes, Type 1, 2, and 3 Claims; C. Edward Webster II for Owl Creek Irrigation District, Type 2 Claims; Donald P. White for private parties City of Riverton, et al., Type 1 Claims; James J. Clear for United States, Type 1 and 2 Claims; Michael S. Messenger for private parties Type 3 Claims; Sky D. Phifer for Hornecker, et al., Type 3 Claims; also present at counsel table were Ruth Clare Yonkee; Dale T. White; Thomas W. Fredericks; David F. Jankowski; and B. Kevin Gover, Arthur Lazarus, Jr., and W. Richard West, Jr., attorneys for the Shoshone Tribes.

Before BROWN, C.J., and THOMAS, CARDINE, and MACY, JJ., and HANSCUM, D.J.

By the court: BROWN, C.J., on Parts III, VII A, B, and D; CARDINE, J., on Parts I, II, IV, V, and VI;

MACY, J., on Parts VII C, VIII and IX. THOMAS, J., filed a dissenting opinion in which HANSCUM, D.J., joined. HANSCUM, D.J., filed a separate dissenting opinion.



WATER DIVISION NO. 3

[illegible]

I

INTRODUCTION

This appeal is from the district court's order adjudicating rights to use water in the Big Horn River System and all other sources within the State's Water Division

No. 3. The district court modified the special master's recommended decree. All parties have appealed from the district court's amended judgment and decree. We affirm in part and reverse in part.

A. *Geography and History*

We begin by acknowledging the comprehensive reports of both the special master and the district court and our use of these reports in our preparation of this section of this opinion.

Water Division No. 3 is essentially identical with what is known as the Big Horn River drainage basin. (See map, oppositie page.) It is located in Fremont, Hot Springs, Washakie, Big Horn and Park counties in northwestern and west central Wyoming and includes parts of Yellowstone National Park. Other federal entities included are the Wind River Indian Reservation, located in the southeastern portion of the region, consisting of approximately 4,000 square miles of land area, the Shoshone and Big Horn National Forests, the East Fork Winter Elk Pasture, the Sheridan County Elk Winter Pasture, the Yellowtail Wildlife Habitat Management Area, the Middle Creek Drainage Area of Yellowstone National Park, the Big Horn Canyon National Recreation Area, and numerous public water reserves, water wells and stock driveways upon federal lands administered by the Bureau of Land Management.

The topography of the area is varied. It includes mountain peaks and valleys, high plateaus, terraced stream valleys and low desert badlands. Elevations range from 3,870 feet near the town of Basin to over 13,000 feet in the Wind River Range. On the reservation the elevation varies from 4,500 feet at the northeastern corner near the Wind River Canyon to 12,500 feet in the Wind River Range.

The primary drainage system in the division is the Wind River-Big Horn River which originates in northern Fremont County and leaves the Division at the Wyoming-Montana border in northern Big Horn County. By statutory definition the division also includes the Clark's Fork of the Yellowstone River, § 41-3-501(a)(iii), W.S. 1977, originating in northwestern Park County, which drains much of the northwestern portion of the region. The Shoshone River, a major tributary of the Big Horn River which originates in northern Park County and joins the Big Horn at the Yellowtail Reservoir, is the other major drainage system in Division 3.

The history of the Big Horn Basin for purposes of this case begins in the early 1800's when explorers, trappers and traders began traveling into northwestern Wyoming, part of the vast hunting grounds of the peripatetic Shoshone Indians. Neither group encroached on the other and relations were friendly. Nonetheless, in 1865, the United States, hoping to preserve the peace and stability, reached an agreement delineating the area within which the Eastern Shoshone roamed, a 44,672,000 acre region comprising part of Wyoming, Colorado and Utah. Following the Civil War, as the westward movement gained momentum, the United States government realized the size of the region set aside for Indians only was unrealistic, and on July 3, 1868, executed the Second Treaty of Fort Bridger with the Shoshone and Bannock Indians, establishing the Wind River Indian Reservation.

During their first years on the reservation, the Shoshone Indians were still dependent on the buffalo as the mainstay of their life, but as the supply rapidly decreased, they began to rely upon an agricultural economy. During the 1870's the Shoshone Indians increased their efforts in both farming and ranching. The Shoshone ceded lands beyond the Popo Agie back to the United States in the 1872 Brunot Agreement. The Arapahoe

moved to the reservation in 1878. By the 1880's it was evident that the agricultural economy of the Indians was failing, and by 1895, the Indians on the Wind River Indian Reservation were totally dependent on the government for food, clothing and shelter. These economic misfortunes compelled them to sell more of their land to the United States. The First McLaughlin Agreement, or Thermopolis Purchase, was concluded in 1897; the Big Horn Hot Springs was the main feature of the lands ceded to the United States for cash payment. An additional 1,480,000 acres of reservation land were ceded to the Government in the Second McLaughlin Agreement in 1904-1905. The revenue derived helped to develop the remaining reservation lands (which came to be known as the "diminished reservation"). The United States Government offered the ceded lands for sale to others, under the provisions of the homestead, townsite, coal and mineral land laws, and reimbursed the Tribes or expended for the benefit of the Tribes the money raised by the sales.

The earliest non-Indian settlements in northwestern and north central Wyoming were near the gold and silver fields in the South Pass area of the Wind River Range. These mining camps soon expanded into permanent farming and ranching communities which relied primarily on cattle ranching and dryland or easily-irrigated farming for sustenance. By the mid-1800's, many small communities had been established by settlers who had obtained their land under the Congressional land disposal acts. By the early 1900's most of the best land in the region was occupied by ranches or irrigated farms. Yet the settlers continued to arrive, forcing gradual expansion onto the dry basin floors and prompting the development of many irrigation projects, often sponsored jointly by private citizens and the United States. The arrival of the homesteaders in the Wind River Basin significantly altered the Indian's economic base. As the number of settlers

and their farms increased, the number of Indians working their own farms and ranches decreased, and they began to rent and eventually to sell their land while hiring themselves out as laborers.

In 1934, all remaining lands which had been ceded to the United States by the 1904 agreement were reserved from non-Indian settlement. In 1940, the Secretary of Interior began a series of restorations of certain undisposed lands to tribal ownership. These lands again became part of the existing Wind River Reservation. In addition, the United States later reacquired, in trust for the Tribes, additional ceded land and certain lands within the diminished reservation which previously had passed into private ownership. Since 1953, the size of the reservation has remained fairly stable.

B. *Procedural History of the Instant Litigation*

On January 22, 1977, Wyoming enacted § 1-1054.1, W.S.1957 (now § 1-37-106, W.S.1977), authorizing the State to commence system-wide adjudications of water rights. The State of Wyoming filed the complaint commencing this litigation and naming the United States as a defendant on January 24, 1977, in the District Court of the Fifth Judicial District of Wyoming.

The United States removed the case to the United States District Court for the District of Wyoming in Cheyenne, Wyom g, claiming the state court was without jurisdiction in this suit against the United States. The federal district court granted the State's motion to remand the case to state court on June 1, 1977, finding that the McCarrar Amendment and § 1-37-106, W.S. 1977, provided for jurisdiction in the state court.

On August 21, 1977, the United States moved to dismiss in state court, again alleging that the state court was without jurisdiction and that the Tribes were an indispensable party. The court granted the Tribes' mo-

tion for leave to file an amicus curiae brief on the dismissal motion. The Shoshone and Arapahoe Indian Tribes also moved to intervene, alleging that the United States would not adequately represent their interests. The court granted intervention on November 21, 1977, and the Tribes entered their appearance. On December 20, 1977, Judge Joffe denied the United States' motion to dismiss and granted the State of Wyoming partial summary judgment on the United States' jurisdictional defenses.

On April 20, 1978, the State moved the court to certify this case to the Board of Control pursuant to § 1-37-106(a)(i)(A)(I), W.S.1977. Judge Joffe entered a First Order of Certification and Referral to the Wyoming State Board of Control on August 22, 1978. The United States and the Tribes objected to the certification and moved for the appointment of a special master. After receiving suggestions, selecting a master and allowing time for objections, Judge Joffe appointed the special master on May 4, 1979. The First Order of Certification and Referral to a special master, entered on May 29, 1979, charged the special master with the duty to:

> "1. Determine the status of those rights which are evidenced by previous Court decrees, as set out in Appendix B to the Complaint herein, as well as those rights evidenced by certificates heretofore issued by the Board of Control, as set out in Appendix C to the Complaint herein, which Appendices may be revised to more accurately reflect the records of the State Engineer and State Board of Control.
>
> "2. Determine the status of all uncancelled permits to acquire the right to use of water as set out in Appendix D and Appendix E to the Complaint herein, which Appendices may be revised to more accurately reflect the records of the State Engineer and State Board of Control.
>
> "3. Adjudicate any interest in or right to use the water of the Big Horn River System and all other

sources within Water Division No. 3, State of Wyoming, arising under the permits described in paragraph 2, above.

"4. Determine the extent and priority date of the adjudicate [sic] any other interest in or right to use the water of the Big Horn River System within Water Division No. 3, State of Wyoming, not otherwise represented by the aforedescribed decrees, certificates, or permits, including, but not limited to, any appropriate or reserved rights of the Arapahoe Tribe, Shoshone Tribe, or of the United States in either its proprietary or fiduciary capacity, which may be hereafter identified by said Tribes or the United States and which are not subject to the decrees, permits and/or certificates described in paragraphs 1 and 2 above."

The United States filed its initial statement of claims on March 6, 1980, and supplemental claims on May 29, 1980. The Tribes filed an additional claim on April 4, 1980.

The case was divided into three phases: Phase I, Indian reserved water rights (appeal decided here); Phase II, non-Indian federal reserved water rights (completed); and Phase III, state water rights evidenced by a permit or certificate (pending).

The master approved stipulations allowing provisional confirmation of adjudicated rights and settling boundaries and dates. He also dismissed the off-reservation hunting and fishing claims and denied summary judgment on instream flow claims made by the Bureau of Land Management. The trial began January 26, 1981, and concluded December 1981.

The special master signed his 451-page Report Concerning Reserved Water Right Claims by and on Behalf of the Tribes in the Wind River Reservation on December 15, 1982, covering four years of conferences and hear-

ings, involving more than 100 attorneys, transcripts of more than 15,000 pages and over 2,300 exhibits.

The report recognized a reserved water right for the Wind River Indian Reservation and determined that the purpose for which the reservation had been established was a permanent homeland for the Indians. A reserved water right for irrigation, stock watering, fisheries, wildlife and aesthetics, mineral and industrial, and domestic, commercial, and municipal uses was quantified and awarded.

A final judgment adjudicating the non-Indian federal reserved water rights (Phase II), pursuant to stipulation, was entered February 9, 1983.

The State of Wyoming, the United States, the Shoshone and Arapahoe Tribes, and numerous private parties presented objections to the master's report, and on May 10, 1983, Judge Joffe entered his Findings of Fact, Conclusions of Law and Judgment approving that portion of the master's report awarding reserved water rights for practicably irrigable acreage within the Wind River Indian Reservation and refusing to accept that portion of the master's report recommending an award of reserved water rights for other than agricultural purposes.

On May 13, 1983, this case was assigned to State District Judge Alan B. Johnson. The United States, the State of Wyoming and the Tribes then moved to alter or amend Judge Joffe's decree. On May 24, 1985, pursuant to Rule 54(b), W.R.C.P., the Amended Judgment and Decree from which this appeal is taken was entered.

A 95-page Supplemental Report was filed June 1, 1984, recommending that those individuals who succeeded to the interests of an Indian allottee and individuals owning land which had once been part of the reservation but was obtained under public land acts and not directly from an allottee be awarded state permit priority dates.

As to the remaining state water rights, the master recommended future proceedings. On May 24, 1985, Judge Johnson entered an order deferring acceptance of the June 1, 1984 Supplemental and Final Report of the Master, providing:

> "Reservation reserved rights are rights created by the courts solely for the protection and enjoyment of Indian tribes so that they can make their reservations their homelands. These rights do not pass to successors in interest to Indian lands. Therefore, this Court will not award to non-Indian parties an 1868 priority date for their water rights." (Citations omitted.)

The court held that non-Indian successors were entitled to water rights with priority dates established by permits and/or certificates issued by the State of Wyoming, or by evidence of appropriation of water for beneficial use and deferred decision on these claims.

On July 5, 1985, the United States moved for reimbursement of one-half the special master's fees and expenses (Phase I costs) on grounds that the McCarran Amendment prohibits assessment of costs against the United States. The motion was denied.

II

JURISDICTION

Early in the litigation, the Tribes challenged the jurisdiction created by § 1-37-106, W.S.1977, on grounds that Article 21, § 26 of the Wyoming Constitution, the so-called disclaimer provision, barred any state court adjudications of Indian water rights. On appeal the Tribes concede that there is no federal law preventing state courts from adjudicating Indian reserved water rights but maintain that the disclaimer provision of the Wyoming Constitution barred the district court, as a matter

of state law, from asserting jurisdiction over their water rights. Because the Tribes' claim involves construction of the Wyoming Constitution, not a federal question, our decision on this issue is final. Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545, 561, 103 S.Ct. 3201, 77 L.Ed.2d 837 (1983).

Article 21, § 26 of the Wyoming Constitution states:

> "The people inhabiting this state do agree and declare that they *forever disclaim all right and title* to the unappropriated public lands lying within the boundaries thereof, and *to all lands lying within said limits owned or held by any Indian or Indian tribes*, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States *and that said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States* • • •." (Emphasis added.)

This disclaimer is almost identical to those found in the constitutions and enabling acts under which Congress admitted most western states into the Union. See Enabling Act of Feb. 22, 1889, § 4, 25 Stat. 676, 677 (North Dakota, South Dakota, Montana, and Washington); Enabling Act of July 16, 1894, § 3, 28 Stat. 107, 108 (Utah); Enabling Act of June 16, 1906, § 3, 34 Stat. 267, 270 (Oklahoma); Enabling Act of June 20, 1910, § 2, § 20, 36 Stat. 557, 558-559, 569 (New Mexico and Arizona); Enabling Act of July 7, 1958, § 4, 72 Stat. 339, as amended by Act of June 25, 1959, § 2(a), 73 Stat. 141 (Alaska). See also Ariz. Const., Art. 20, ¶ 4; Idaho Const., Art. 21, § 19; Mont. Const., Ordinance No. 1; N.M. Const., Art. 21, § 2; Utah Const., Art. 3. The disclaimers and enabling acts did not establish new bars to state jurisdiction over Indians. They were simply intended to make clear that the new states entered the Union subject to the same jurisdiction limitations first imposed upon the other states by the landmark case of

Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832). See Arizona v. San Carlos Apache Tribes, supra 463 U.S. at 561-563; Comment, State Disclaimers of Jurisdiction Over Indians: A Bar to the McCarran Amendment, 18 Land & Water L. Rev. 175, 180 (1983) (discussing Draper v. United States, 164 U.S. 240, 17 S.Ct. 107, 41 L. Ed. 2d 419 (1986)).

The argument that the state disclaimer should be interpreted to be more protective of the Tribes than the controlling federal law, the McCarran Amendment, has been presented to the Tenth Circuit Court of Appeals and the Supreme Courts of Arizona and New Mexico. Each of these courts has rejected the argument. Jicarilla Apache Tribe v. United States, 601 F.2d 1116, 1130, (10th Cir. 1979), cert. denied 444 U.S. 995, 100 S.Ct. 530, 62 L.Ed.2d 426 (1979); United States v. Superior Court In and For Maricopa County, 144 Ariz. 265, 697 P.2d 658, 669 (1985); State ex rel. Reynolds v. Lewis, 88 N.M. 636, 545 P.2d 1014, 1015 (1976). The persuasive logic of these courts was well stated by the Arizona Supreme Court:

> "If one thing is clear on this issue, it is that the Enabling Act and the provisions which it required to be inserted in the state constitution were intended to ensure supremacy of federal policy and federal law with regard to Indian land. The federal policy, asserted in the McCarran Amendment, is that the United States is '. . . to represent, as guardian, • • • the Indian tribes in any state court general water rights adjudication proceeding . . .' Jicarilla, supra, 601 F.2d at 1130. There is no clear necessity to read the disclaimer provisions of article 20, ¶ 4 of the state constitution as a cession of exclusive jurisdiction. We prefer, if possible, the interpretation which best serves the purposes and objectives of federal law and federal policy, which we acknowledge as supreme in this area. One of those objectives is that Indian claims to surface waters ordinarily be adjudicated

> in state court as part of a general water rights adjudication, with the United States representing Indian interests. San Carlos, 463 U.S. at [564], 103 S.Ct. at 3212. Unless compelled by unambiguous language, we refuse to interpret the provisions of the Arizona Constitution so restrictively as to defeat federal policy when supremacy of that policy was the very objective Congress sought to accomplish by requiring article 20, ¶ 4 to be part of the organic law of this state." United States v. Superior Court In and For Maricopa County, supra, 697 P.2d at 669. See also Arizona v. San Carlos Apache Tribe, supra, 463 U.S. at 562-563, 103 S.Ct. at 3211; and Comment, supra, 18 Land & Water L. Rev. at 198-199.

Just one court, the Ninth Circuit Court of Appeals, has held a state constitutional disclaimer to be an independent bar to state jurisdiction over Indian water rights. Northern Cheyenne Tribe of Northern Cheyenne Indian Reservation v. Adsit, 668 F.2d 1080 (9th Cir. 1982). But this case was reversed by the United States Supreme Court in Arizona v. San Carlos Apache Tribe of Arizona, supra 463 U.S. 545, 103 S.Ct. 3201, holding that it was not the business of the Ninth Circuit to interpret Montana's disclaimer as a bar to state jurisdiction after the Montana court had decided to exercise jurisdiction:

> "[T]o the extent that a claimed bar to state jurisdiction in these cases is premised on the respective State Constitutions, that is a question of state law over which the state courts have binding authority. Because, in each of these cases, the state courts have taken jurisdiction over the Indian water rights at issue here, we must assume, until informed otherwise, that—at least insofar as state law is concerned—such jurisdiction exists." Id., 463 U.S. at 561, 103 S.Ct. at 3210.

We have never had occasion to consider the effect of the Wyoming disclaimer provision upon a water case.

although it was considered in a civil case involving a collision between a motor vehicle and a horse on the Wind River Indian Reservation. State ex rel. Peterson v. District Court of the Ninth Judicial District, Wyo., 617 P.2d 1056 (1980). There we agreed that the disclaimer provision should be interpreted to be consistent with federal law, stating:

> "McClanahan [v. State Tax Commission of Arizona, 411 U.S. 178, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973)] thus suggests that interpretation of Article 21, Section 26, of the Wyoming Constitution is largely a question of federal law." Id., 617 P.2d at 1067.

We hold that Article 21, § 26 of the Wyoming Constitution only bars state jurisdiction over Indian water rights when federal law also bars that jurisdiction. Congress's policy under the McCarran Amendment is to allow state courts to adjudicate Indian water rights as part of general stream adjudications. Arizona v. San Carlos Apache Tribe of Arizona, supra 463 U.S. at 564-565, 103 S.Ct. at 3212; Cappaert v. United States, 426 U.S. 128, 145-146, 96 S.Ct. 2062, 2073, 48 L.Ed.2d 523 (1976). Because of the McCarran Amendment, there is no federal law which prevents the State from adjudicating the Indian water rights on the Big Horn River System. The district court correctly assumed jurisdiction in this case.

III

IS THERE A RESERVED WATER RIGHT FOR THE WIND RIVER INDIAN RESERVATION?

A. *Preliminary Matters*

1. Preservation of Objections for Review and Standard of Review in General

Rule 53(e)(2), W.R.C.P., provides:

> "(2) In Non-Jury Actions.-In an action to be tried without a jury the court shall accept the master's

> findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court, after hearing, may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

Whether objections to the master's report must be made in the district court to preserve an issue for appeal has not previously been before this court. But, federal courts construing the similar federal rule, F.R.C.P. 53(e), generally hold it unnecessary to make objections to a special master's report. Henry Hanger and Display Fixture Corporation of America v. Sel-O-Rak Corporation, 270 F.2d 635 (5th Cir. 1959); Shima v. Brown, 133 F.2d 48, 49, (D.C. Cir.), cert. denied 318 U.S. 787, 63 S.Ct. 982, 87 L.Ed. 1154 (1943). In Mitchell v. All-States Business Products Corporation, 250 F.Supp. 403, 409 (E.D.N.Y. 1965), the court stated:

> "The Rule provides that 'any party may serve written objections,' but it is not necessary to make objections to the Master's findings as permitted therein. Henry Hanger & Display Fixture Corp. of America v. Sel-O-Rak Corp., 270 F.2d 635 (5th Cir. 1959). The Rule clearly gives the court the power to modify the Master's report upon a motion for action upon the report and the failure of the Secretary to timely serve objections does not limit this power. 5 Moore, Federal Practice ¶ 53.12 [1]. Cf., Bingham Pump Co. v. Edwards, 118 F.2d 338 (9th Cir.), cert. denied, 314 U.S. 656, 62 S.Ct. 107, 86 L.Ed. 525 (1941); United States v. 1,674.34 Acres of Land, More or Less, in Benton County, Arkansas, 220 F. Supp. 893 (W.D.Ark. 1963)."

We consider the federal courts' construction of Rule 53(e), see Centric Corp. v. Drake Bldg. Corp., Wyo., 726 P.2d 1047 (1986); B-T Ltd. v. Blakeman, Wyo., 705 P.2d 307 (1985); and State ex rel. Hopkinson v. District Court, Teton County, Wyo., 696 P.2d 54 (1985), and hold that the district court, absent objection, could review the special master's report. Rule 52(b), W.R.C.P. It is appropriate that this court also review the master's report and actions of the district court. Objections are unnecessary to preserve an issue for appeal.

The bulk of objections made involve the sufficiency of the evidence to support the awards or deletions from claims. When addressing a sufficiency of the evidence question, this court looks only at the evidence most favorable to the prevailing party, giving to it every favorable inference, and leaving out of consideration entirely evidence in conflict therewith. Allstar Video, Inc. v. Baeder, Wyo., 730 P.2d 796, 798 (1986); Wangler v. Federer, Wyo., 714 P.2d 1209, 1216-1217 (1986); Tremblay v. Reid, Wyo., 700 P.2d 391, 392 (1985); City of Rock Springs v. Police Protective Association, Wyo., 610 P.2d 975, 980 (1980).

2. Collateral Estoppel

The doctrine of collateral estoppel prevents relitigation of "issues which were involved actually and necessarily in the prior action between the same parties." Delgue v. Curutchet, Wyo., 677 P.2d 208, 214 (1984). The State of Wyoming is not estopped from litigating the question of intent to reserve water by United States v. Hampleman, No. 753, June 26, 1916 (D. Wyo.), because the court there decided only that the water rights of the Indian allottees were within the exclusive jurisdiction of the United States. The State was not a party to United States v. Parkins, 18 F.2d 642 (D. Wyo. 1926), which indicated water had been reserved for the Indians. The case of Merrill v. Bishop, 74 Wyo. 298, 287 P.2d 620

(1955), does not collaterally estop Wyoming from raising the question of intent to reserve water because the basis of that decision is that the plaintiffs failed to make their case for injunctive relief on the facts; the question of intent to reserve water was, therefore, not involved. It is clear that these cases do not collaterally estop the State of Wyoming from litigating the question of intent to reserve water.

3. Equitable Estoppel

It is claimed that the United States should be equitably estopped from asserting Indian water rights for the reservation because the United States induced settlers to relocate on the ceded reservation lands and other lands in the Division and acquire water rights under state law.

The practice of the United States of obtaining state water permits did not mislead the individual appropriators to believe that the United States would not seek future water rights with an 1868 priority date. The United States should not be estopped from claiming a water right priority date for the future projects which would defeat the rights of other water users. A finding of affirmative misconduct is a prerequisite to invoking the doctrine of equitable estoppel.

This court recognized the element of affirmative misconduct in DeWitt v. Balben, Wyo., 718 P.2d 854, 861-862 (1986) wherein we cited the following:

> "Equitable estoppel or estoppel by misrepresentation is the effect of the *voluntary conduct* of a person whereby he is precluded, both at law and in equity, from asserting rights against another person relying on such conduct; and it arises where a person, by his acts, representations, or admissions, or even by his silence when it is his duty to speak, intentionally or through culpable negligence induces another to believe that certain facts exist, and the other person

rightfully relies and acts on such belief, and will be prejudiced if the former is permitted to deny the existence of such facts." (Emphasis added.) 31 C.J.S. Estoppel § 59, p. 367 (1964). See also Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 104 S.Ct. 2218, 81 L.Ed.2d 42 (1984) (reasonable reliance on definite misrepresentation to one's detriment required).

It is clear that in order to invoke the doctrine of equitable estoppel against a government or public agency functioning in its official capacity there must be a showing of affirmative misconduct. Greub v. Frith, Wyo., 717 P.2d 323, 326 (1986); Big Piney Oil and Gas Company v. Wyoming Oil and Gas Conservation Commission, Wyo., 715 P.2d 557 (1986). See also United States v. California, 332 U.S. 19, 39-40, 67 S.Ct. 1658, 1668-69, 91 L.Ed. 1489 (1947); Utah Power and Light Co. v. United States, 243 U.S. 389, 405-409, 37 S.Ct. 387, 391, 61 L.Ed. 791 (1917).

In the case at bar, there is no doubt that the United States facilitated settlement of non-Indian lands in Water Division No. 3. In addition, during the period 1905-1908, the United States obtained state water permits for some 145,000 acres of Indian lands on the Wind River Indian Reservation and began construction of the irrigation project. Judge Johnson was correct in concluding that none of this indicates affirmative misconduct on the part of the United States.

4. Burden of Proof

The record is unclear as to which party was given the burden of proof with respect to the existence of a reserved water right. Insofar as the special master may have placed the burden of establishing its claims to water on the United States, he did not err. It is well established that "[t]he burden of proof is on the party asserting the affi mative of any issue. Morrison v. Reilly, Wyo., 511

P.2d 970 (1973)." Osborn v. Manning, Wyo., 685 P.2d 1121, 1124 (1984). See e.g., Younglove v. Graham and Hill, Wyo., 526 P.2d 689, 693 (1974) (burden of proof is on one asserting an affirmative defense); Hawkeye-Security Insurance Company v. Apodaca, Wyo., 524 P.2d 874, 879 (1974) (burden of showing an exception to statute of limitations is on the one claiming the exception). Here, the Tribes and the United States asserted "affirmative claims" to reserved water rights for the Indians. The master accepted the Tribes' proposal that the parties be realigned, ordering that the United States and the Tribes be realigned as plaintiffs.

The McCarran Amendment did not contemplate that the United States would be absolved from the usual burdens once it was joined in litigation. "If we were sued, we would have to prove * * * our Indian Rights * * *." Hearings Before Subcommittee of the Committee on the Judiciary, United States Senate, 82d Cong., 1st Sess., on S. 18, 1951 at 7. The United States has been required to establish its reserved water rights. United States v. New Mexico, 438 U.S. 696, 705, 98 S.Ct. 3012, 3016, 57 L.Ed.2d 1052 (1978); Arizona v. California, 373 U.S. 546, 598, 83 S.Ct. 1468, 1497, 10 L.Ed.2d 542 (1963); Arizona v. California, 460 U.S. 605, 638, 103 S.Ct. 1382, 1401, 75 L.Ed.2d 318 (1983). Block v. North Dakota ex rel. Board of University and School Lands, 461 U.S. 273, 288, 103 S.Ct. 1811, 1820, 75 L.Ed.2d 840 (1983) does not undercut these cases, because nothing indicates that the McCarran Amendment attaches any condition that the United States be relieved from ordinary burdens of proof in litigation.

The special master could not have erred in requiring the Tribes and the United States to substantiate their claim that water had been reserved for the Wind River Indian Reservation. Because they prevailed on this issue, they were not harmed in any event.

B. *Was There an Intent to Reserve Water?*

1. Analysis Below

Both the special master and the district court undertook the rigorous analysis called for by United States v. New Mexico, supra 438 U.S. at 700, 98 S.Ct. at 3014: "Each time this Court has applied the 'implied-reservation-of-water doctrine,' it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated."

In determining that there was intent to reserve water for the reservation, the special master looked to the treaty, the decision of Winters v. United States, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908), and the act admitting Wyoming to the Union. He "analyzed the 348 'Intent and Purposes' exhibits offered by the State of Wyoming, along with the competent argument of counsel for the State of October 7, 1981, supporting the position that no reservation of water exists." The master also studied Merrill v. Bishop, supra 287 P.2d 620. The foregoing indicates quite clearly that the special master did not blindly presume a reserved water right existed, but that he examined the law and the evidence relating to intent and simply found against the State.

Nor did the district court blindly presume intent to reserve water. Judge Joffe adopted the report of the special master with some exceptions. He rejected the State's argument that there was no intent to reserve water because it would not only run counter to his interpretation of the intent of Congress but it would also run counter to controlling law on the subject. Judge Johnson adopted Judge Joffe's decision on intent to reserve water.

2. The Appeal

a. Intent to Reserve Water in 1868

The treaty establishing the Wind River Indian Reservation, signed on July 3, 1868, ratified on February 16, 1869, and proclaimed on February 24, 1869, Treaty of Ft. Bridger, 15 Stat. 673 (1869), is silent on the subject of water for the reservation. Yet both the district court and the special master found an intent to reserve water. We affirm.

The case of Byers v. Wa-Wa-Ne, 86 Or. 617, 169 P. 121, 127 (1917), does not support Wyoming's position that because the Wind River Indians did not need water in 1868, there is no basis for implying a reserved water right. Unlike the lands involved in Byers, the lands in the case at bar did require water to produce crops in 1868. In addition, Byers prevailed in that case because her competing water right was granted by Congress. Id., 169 P. at 122-123.

Congress, by passing the settlement acts, intended non-Indian settlers to obtain water rights. An award of Indian reserved water rights would damage the interests the settlers had established under state law. The settlement acts do not, however, simply by recognizing that water is important to settlers, indicate that water was not important to the Indians as well. Nor do the acts indicate that Congress did not intend to reserve necessary water for the Indians.

In 1890, Wyoming was admitted to the United States. The act provided that "Wyoming * * * is hereby declared admitted to the union on an equal footing with the original States in all respects whatever; and that the constitution which the people of Wyoming have formed for themselves be, and the same is hereby, accepted, ratified, and confirmed." 26 Stat. 222, 51st Cong., Sess. I, ch. 664 (1890). Section 2 of the act provided that the

Act of Admission did not affect the reservation of Yellowstone National Park nor the right and ownership of the United States to the park. Id. The constitution which was adopted provided that "[t]he water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the State." Wyoming Constitution, Art. 8, § 1. It also provided that "[p]riority of appropriation for beneficial uses shall give the better right." Article 8, § 3. In addition, the constitution disclaimed jurisdiction over Indian lands. Wyoming Constitution, Art. 21, § 26.

This court's decision in Merrill v. Bishop, supra, 287 P.2d 620, while indicating that the admission had impacted the rights of successors to allottees in the ceded portions of the reservation, did not decide the question of intent to reserve water, but held only that the allottees' successors failed to prove the facts necessary for an injunction. The United States District Court for the District of Wyoming, on the other hand, has twice indicated that the treaty did reserve water for the Indians, both cases being decided after Wyoming was admitted to the Union. United States v. Hampleman, supra No. 753, June 26, 1916; and United States v. Parkins, supra 18 F.2d 642. The United States Supreme Court has said:

> "The Court has previously concluded that whatever powers the States acquired over their waters as a result of congressional Acts and admission into the Union, however, Congress did not intend thereby to relinquish its attorney authority to reserve unappropriated water in the future for use on appurtenant lands withdrawn from the public domain for specific federal purposes." United States v. New Mexico, supra 438 U.S. at 698, 98 S.Ct. at 3013.

The Gila National Forest was set aside in 1899, before New Mexico was admitted to the Union. Thus, the federal courts have determined that admission acts do not

indicate that Congress abandoned reserved water rights. The fact that the admission act reserved to the United States jurisdiction and ownership of Yellowstone National Park but is silent as to the Wind River Indian Reservation in no way detracts from our conclusion.

The equal footing clause contained in the Act of Admission does not evidence an intent not to reserve water. The equal footing doctrine argument was rejected in United States v. District Court in and For County of Eagle, Colorado, 401 U.S. 520, 91 S.Ct. 998, 28 L.Ed.2d 278 (1971) (U.S. can reserve water before or after admission). See also United States v. Texas, 339 U.S. 707, 70 S.Ct. 918, 94 L.Ed. 1221 (1950) (equal footing clause refers only to political rights and sovereignty). The fact that the irrigability of Wyoming was an important factor in the decision to admit it does not indicate that anyone intended to deprive the Indians of the advantage of water.

We now hold that, examining the Act of Admission and the constitution as a whole, and considering more recent federal pronouncements on the issue, the admission of Wyoming to the Union did not evidence an intent by Congress not to reserve water for the reservation.

The fact that the pre-Winters years evidenced some uncertainty in the status of Indian water rights negatives the notion that actions during these years were indicative of an intent not to reserve water for the Wind River Indian Reservation. The master was correct in determining that the uncertain acts between 1902 and 1908 reflect only the uncertainty in the law, not an intent not to reserve water.

The Second McLaughlin Agreement, Treaty of April 21, 1904, Act of March 3, 1905, 33 Stat. 1016, does not evidence an intent not to reserve water for the reservation. The Indians were eager to secure their water rights, Minutes of Council, Shoshone Agency, April 19,

1904, at 19, and understood that the agreement would make their water rights firm. Id. at 22. The agreement contained the following provisions:

> "The said Indians belonging on the Shoshone or Wind River Reservation * * * do hereby cede, grant, and relinquish to the United Statse, all right, title, and interest they may have to all the lands embraced within the reservation, except [certain lands]." Article 1.
>
> "The balance [of $85,000, after per capita payments, estimated to be approximately $2,000] shall be devoted to surveying, platting, making of maps, payment of fees, and performance of such acts as are required by the statutes of the State of Wyoming in securing water rights from said State for the irrigation of such lands as shall remain the property of said Indians * * *." Article 3 "[One hundred and fifty thousand dollars was authorized] for the construction and extension of an irrigation system within the diminished reservation for the irrigation of the lands of the said Indians * * *." Article 4.
>
> "It is further understood that nothing in this agreement shall be construed to deprive the said Indians of the Shoshone or Wind River Reservation, Wyoming, of any benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement." Article 10.

A reservation of water with an 1868 priority date is not inconsistent with the permit provisions of the pre-Winters 1905 Act. The rejection of the provision which would have given the Indians a grace period in which to secure their own permits for allotments on the ceded portion of the reservation, H.R. Rep. No. 3700, 58th Cong., 3d Sess. (1905), is no indication there was never any intent to reserve water for the Indians, but only of fear that it would delay settlement of the area opened. S. Rep. No. 4263, 58th Cong., 3rd Sess. (1905).

The fact that contemporary agreements indicate that the United States knew how to reserve water for Indians is of marginal relevance. Congress also knew how to express a relinquishment of reserved water rights. See First McLaughlin Agreement, or Thermopolis Purchase, supra, Article 1 (Tribes surrender "all their right, title, and interest of every kind and character" to water rights appurtenant to ceded lands). It is well established that Congress must use such explicit statutory language in order to abrogate treaty rights. Oneida County, N.Y. v. Oneida Indian Nation of New York State, 470 U.S. 226, 247, 105 S.Ct. 1245, 1258, 84 L.Ed.2d 169 (1985), citing Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 690, 99 S.Ct. 3055, 3077, 61 L.Ed.2d 823 (1979) and Menominee Tribe of Indians v. United States, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968). Cf., Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586, 97 S.Ct. 1361, 1363, 51 L.Ed.2d 660 (1977).

Inconsistent actions by the United States do not evidence an intent not to reserve water. After the 1905 Act was passed, the United States did seek and obtain state water permits for Indian land and continued to seek permits while asserting reserved water rights for the reservation after Winters v. United States, supra, 207 U.S. 564, 28 S.Ct. 207 (1908) was decided. The United States more strongly asserted its reserved water rights when, in 1910, it refused to apply to the State for an extension of time in which to complete the irrigation project authorized by the 1905 Act. It was in 1911 that Water Commissioner Hampleman first closed the headgates on an allottee's ditches claiming that she had no valid state permit. Ultimately the case which arose from his actions was decided in favor of the Indians in 1916. In the meantime, in 1914, Congress rejected a provision which would have protected water rights for allotments: "Any invasion of a prior right of the United States to the waters of a stream is a trespass, and the Government

may maintain a suit in equity to protect its right against any or all such trespassers." 1913 H.R. 12579, Indian Appropriations Bill, Subcommittee of the Committee on Indian Affairs of the House of Representatives. That this provision, sought to be attached to the 1914 Appropriations Act, 38 Stat. 582, was not enacted into law is no indication that there was no intent to reserve water; the amendment could not be enacted because it was ruled out of order.

Nor do other cited actions evidence an intent not to reserve water. In 1926, the federal district court announced its decision in United States v. Parkins, supra 18 F.2d 642, finding against a successor to an allottee who had been diverting water without authority. In a 1939 act appropriating a fund for the Shoshone Tribe, Congress authorized the Secretary of the Interior to establish land use districts within the ceded and nonceded lands and to acquire, exchange and consolidate lands and water rights. In 1953, Congress appropriated funds constituting final payment, pursuant to the 1905 Act, for certain lands withdrawn and reserved under the 1902 Reclamation Act. In 1955, the Wyoming Supreme Court decided the case of Merrill v. Bishop, supra 287 P.2d 620, in favor of the State and against allottees' successors. These actions are not sufficient proof of intent not to reserve water for the Indians.

b. Subsequent Abrogation

What we have said above disposes of the contention that even if the treaty did reserve water for the Wind River Indian Reservation in 1868, the right to water was abrogated by the 1890 Act of Admission and/or the 1905 Act. If the actions are not sufficient evidence to show there never was any intent to reserve water, they are not sufficient to make the even stronger showing that such an established treaty right has been abrogated. The

district court did not err in finding a reserved water right for the Wind River Indian Reservation.

c. Sensitivity Doctrine

The sensitivity doctrine does not apply to the question of intent to reserve water. United States v. New Mexico, supra, 438 U.S. 704, 98 S.Ct. at 3016. At any rate, both the special master and the district court were sensitive to existing water rights in determining there was an intent to reserve water for the Wind River Indian Reservation.

IV

PURPOSES OF THE WIND RIVER INDIAN RESERVATION

The government may reserve water from appropriation under state law for use on the lands set aside for an Indian reservation. Winters v. United States, supra 207 U.S. 564, 28 S.Ct. 207. A reserved water right is implied for an Indian reservation where water is necessary to fulfill the purposes of reservation. United States v. Adair, 723 F.2d 1394, 1409 (9th Cir. 1983), cert. denied sub nom. Oregon v. United States, 467 U.S. 1252, 104 S.Ct. 3536, 82 L.Ed.2d 841 (1984). The quantity of water reserved is the amount of water sufficient to fulfill the purpose of the lands set aside for the reservation. See, e.g., Cappaert v. United States, supra 426 U.S. at 138, 96 S.Ct. 2069, and 426 U.S. at 141, 96 S.Ct. at 2071 (relying on Arizona v. California, supra 373 U.S. at 600-601, 83 S.Ct. at 1497-1498, 10 L.Ed.2d at 578-579 (to the same effect)); United States v. New Mexico, supra 438 U.S. at 698, 98 S.Ct. at 3013. Congress can reserve water for lands withdrawn for specific federal purposes. Winters v. United States, supra 207 U.S. 564, 28 S.Ct. 207; Arizona v. California, supra 373 U.S. at 597-598, 93 S.Ct. at 1496; Colville Confederated Tribes v. Walton, 647 F.2d 42, 46 (9th Cir.), cert. denied 454 U.S.

1092, 102 S.Ct. 657, 70 L.Ed.2d 630 (1981), cert. denied 475 U.S. 1010, 106 S.Ct. 1183, 89 L.Ed.2d 300 (1986). We have already decided that Congress intended to reserve water for the Wind River Indian Reservation when it was created in 1868, and we accept the proposition that the amount of water impliedly reserved is determined by the purposes for which the reservation was created.

The special master's finding that the principal purpose for the creation of the reservation was to provide a permanent homeland for the Indians is not a factual determination. The master determined the purpose of the Indian reservation from the face of the treaty as a matter of law. Where the contract is unambiguous, the meaning or intent is derived from the instrument itself as a matter of law. Rouse v. Munroe, Wyo., 658 P.2d 74, 77 (1983); Goodwin v. Upper Crust of Wyoming, Inc., Wyo., 624 P.2d 1192, 1195 (1981); Amoco Production Company v. Stauffer Chemical Company of Wyoming, Wyo., 612 P.2d 463, 465 (1980); Goodman v. Kelly, Wyo., 390 P.2d 244, 247 (1964). The legal principles applicable to the interpretation of contracts apply also to interpretation of Indian treaties. Washington v. Washington State Commercial Passenger Fishing Vessel Association, supra 443 U.S. at 675, 99 S.Ct. at 3069. The purposes of a treaty are ascertained by utilizing rules for determining the intent of parties to a contract. Sullivan v. Kidd, 254 U.S. 433, 439, 41 S.Ct. 158, 160, 65 L.Ed. 344 (1921). The special master found as a matter of law that the treaty was unambiguous and ascertained the purpose for creation of the reservation from the four corners of the treaty, stating:

> "Analyzing the Treaty in its entirely, with specific reference to the above cited provisions, it is not at all unreasonable to conclude that the principal purpose for entering into this Treaty was to provide the Indians with a homeland where they could establish a permanent place to live and to develop their civiliza-

> tion just as any other nation throughout history has been able to develop its civilization."

The district court ascertained the purpose of the reservation from the treaty itself, stating: "On the very face of the Treaty, it is clear that its purpose was purely agricultural." This legal determination is fully reviewable by this court.

A. *The Treaty*

The Treaty with the Shoshone and Bannacks, July 3, 1868, provides in pertinent part:

> "ARTICLE I. From this day forward, peace between the parties to this treaty shall forever continue. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they hereby pledge their honor to maintain it.
>
> * * * * *
>
> "ARTICLE II. It is agreed that whenever the Bannacks desire a reservation to be set apart for their use, or whenever the President shall deem it advisable * * *, he shall cause a suitable one to be selected for them in their present country * * *. The United States further agrees that the following district of county * * * shall be and the same is set apart for the absolute and undisturbed use and occupation of the Shoshone Indians herein named, and for such other friendly tribes as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the

territory described in this article for the use of said Indians, and henceforth they will and do hereby relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid.

"ARTICLE III. The United States agrees * * * to construct * * * a warehouse or storeroom * * *; an agency building for the residence of the agent * * *; a residence for the physician * * *; and five other buildings, for a carpenter, farmer, blacksmith, miller, and engineer * * *; also a schoolhouse or mission building * * *.

"The United States agrees further to cause to be erected * * * a good steam circular sawmill, with a grist-mill and shingle machine attached * * *.

"ARTICLE IV. The Indians herein named agree * * * they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as place subsists * * *.

* * * * *

"ARTICLE VI. If any individual belonging to said tribes * * * shall desire to commence farming, he shall have the privilege to select * * * a tract of land within the reservation of his tribe * * * which tract * * * shall cease to be held in common * * *.

* * * * *

"ARTICLE VII. In order to insure the civilization of the tribes entering into this treaty, the necessity of education is admitted, especially of such of them as are or may be settled on said *agricultural reservations* * * *.

"ARTICLE VIII. When the head of a family or lodge shall have selected lands and received his cer-

tificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year * * * and for each succeeding year he shall continue to farm, for a period of three years more * * *.

"And it is further stipulated that such persons as commence farming shall receive instructions from the farmers * * * and whenever more than one hundred persons on either reservation shall enter upon the cultivation of the soil, a second blacksmith shall be provided * * *.

"ARTICLE IX. * * * the United States agrees to deliver at the agency house on the reservation [items of clothing].

"* * * and in addition to the clothing herein named, the sum of ten dollars shall be annually appropriated for each Indian roaming and twenty dollars for each Indian engaged in agriculture, for a period of ten years, to be used by the Secretary of the Interior in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper.

* * * * *

"ARTICLE XII. It is agreed that the sum of five hundred dollars annually for three years from the date when they commence to cultivate a farm, shall be expended in presents to the ten persons of said tribe, who in the judgment of the agent, may grow the most valuable crops for the respective year." (Emphasis added.)

The court in Colville Confederated Tribes v. Walton, supra 647 F.2d 42, did not mandate that a single purpose for the reservation be found. Rather, the court applied the specific purpose test outline in United States v.

New Mexico, supra 438 U.S. at 702, 98 S.Ct. at 3015, in an Indian reserved water case and found two primary purposes: "to provide a homeland for the Indians to maintain their agrarian society," 647 F.2d at 47, for which practicably irrigable acreage was the measure, and to preserve the "tribes' access to fishing grounds." 647 F.2d at 48. See also Confederated Salish and Kootenai Tribes of Flathead Reservation, Montana v. Flathead Irrigation and Power Project, 616 F. Supp. 1292, 1297 (D. Mont. 1985). The validity of the ninth circuit's application of the New Mexico test has been drawn into question because the standards governing non-Indian federal reserved water rights differ from those governing Indian reserved water rights. F. Cohen, Handbook of Federal Indian Law, ch. 10 § 133, at 583-584 (1982 ed.); State ex rel. Greely v. Confederated Salish and Kootenai Tribes of Flathead Reservation, Mont., 712 P.2d 754, 766-767 (1985). See also Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 105 S.Ct. 2399, 2404, 85 L.Ed.2d 753 (1985). In United States v. Adair, supra 723 F.2d at 1408, the ninth circuit agreed that non-Indian federal reservation reserved water rights cases only provide useful guidelines to Indian reserved water rights.

The following cases are not authority for limiting reserved water for a permanent homeland reservation to irrigation because the only reserved water rights sought were for irrigation and related uses: Winters v. United States, supra 207 U.S. 564, 28 S.Ct. 207; United States ex rel. Ray v. Bibner, 27 F.2d 909 (D.C. Idaho 1928); Skeem v. United States, 273 F. 93 (C.C.A. Idaho 1921); United States v. Powers, 305 U.S. 527, 533, 59 S.Ct. 344, 83 L.Ed.2d 330 (1939). See also Anderson v. Spear-Morgan Livestock Company, 107 Mont. 18, 79 P.2d 667, 669 (1938) (dicta indicates only an implied reservation for irrigation, but does not address the question of reservation of water for other uses).

It is well established that the judgment of the district court will be upheld for any proper reason appearing of

record. Anderson v. Bauer, Wyo., 681 P.2d 1316 (1984); Mentock v. Mentock, Wyo., 638 P.2d 156 (1981). Considering the well-established principles of treaty interpretation, the treaty itself, the ample evidence and testimony addressed, and the findings of the district court, we have no difficulty affirming the finding that it was the intent at the time to create a reservation with a sole agricultural purpose. Indian treaties should be interpreted generously, Oneida County, N.Y. v. Oneida Indian Nation of New York State, supra, 470 U.S. at 247, 105 S.Ct. at 1258; Carpenter v. Shaw, 280 U.S. 363, 366-367, 50 S.Ct. 121, 122, 74 L.Ed. 478 (1930), and liberally in favor of the Indians, United States v. Shoshone Tribe, 304 U.S. 111, 117, 58 S.Ct. 794, 798, 82 L.Ed. 1213 (1938); Winters v. United States, supra 207 U.S. 564, 28 S.Ct. 207; McClanahan v. State Tax Commission of Arizona, 411 U.S. 164, 174, 93 S.Ct. 1257, 1263, 36 L.Ed.2d 129 (1973); Washington v. Washington State Commercial Passenger Fishing Vessel Association, supra 443 U.S. at 676, 99 S.Ct. at 3069; State ex rel. Greely v. Confederated Salish and Kootenai Tribes of Flathead Reservation, supra 712 P.2d at 762-763, United States v. Adair, supra 723 F.2d at 1413; United States v. Lower Elwha Tribe, 642 F.2d 1141, 1144 (9th Cir.), cert. denied sub nom. Makah Indian Tribe v. Lower Elwha Tribe, 454 U.S. 862, 102 S.Ct. 320, 70 L.Ed.2d 161 (1981), and should not be given a crabbed or restrictive meaning. McClanahan v. State Tax Commission of Arizona, supra 411 U.S. at 176, 93 S.Ct. at 1264. Nor should treaties be improperly construed in favor of Indians, for "'[W]e cannot remake history,'" Rosebud Sioux Tribe v. Kneip, supra 430 U.S. at 615, 97 S.Ct. at 1377, citing DeCoteau v. District County Court for Tenth Judicial District, 420 U.S. 425, 449, 95 S.Ct. 1082, 1095, 43 L.Ed.2d 300 (1975); In Re Wilson, 30 Cal.3d 21, 36, 177 Cal. Rptr. 336, 346, 634 P.2d 363, 372 (1981) (citing same case), and courts should not distort the words of a treaty to find rights inconsistent with its

language. Ward v. Race Horse, 163 U.S. 504, 16 S.Ct. 1076, 41 L.Ed. 244 (1896).

Article 7 of the treaty refers to "said agricultural reservations." Article 6 authorizes allotments for farming purposes; Article 8 provides seeds and implements for farmers; in Article 9 "the United States agreed to pay each Indian farming a $20 annual stipend, but only $10 to 'roaming' Indians"; and Article 12 establishes a $50 prize to the ten best Indian farmers. The treaty does not encourage any other occupation or pursuit. The district court correctly found that the reference in Article 4 to "permanent homeland" does nothing more than permanently set aside lands for the Indians; it does not define the purpose of the reservation. Rather, the purpose of the permanent-home reservation is found in Articles 6, 8, 9, and 12 of the treaty.

The emphasis on education for Indians settled on "said agricultural reservations," in Article 7 also helps to define the purpose of the reservation. Those words do not refer only to the farm tracts selected by individual Indians under Article 6, but to the two Indian reservations authorized by the treaty—for the Shoshone in Wyoming (Wind River) and for the Bannack in Utah (Fort Hall). Other treaties have emphasized the importance of education in somewhat different language. See, e.g., Treaty with the Ute Tribe, March 2, 1868, 15 Stat. 619, Article 8; Treaty with the Navajo Tribe, June 1, 1868, 15 Stat. 667, Article 6; Treaty of Fort Laramie with the Cheyenne and Arapahoe, May 10, 1868, 15 Stat. 655, Article 4; Treaty of Fort Laramie with the Crow, May 7, 1868, 15 Stat. 649, Article 7. The thrust of all these provisions is that education is especially important for those Indians who are settled and engaged in agriculture and are no longer roaming. Thus, while Article 7 of the instant treaty emphasizes the importance of education for Indians engaged in farming, "said agricultural reservations" does have a broader meaning—that the two Indian reservations were to be agricultural.

Although the treaty did not force the Indians to become farmers and although it clearly contemplates that other activities would be permitted (hunting is mentioned in Article 4, lumbering and milling in Article 3, roaming in Article 9), the treaty encouraged only agriculture, and that was its primary purpose. The Court in United States v. Shoshone Tribe of Indians, supra 304 U.S. 111, 58 S.Ct. 794, discussing the purpose of this treaty, stated:

> "Provisions in aid of teaching children and of adult education in farming, and to secure for the tribe medical and mechanical service, to safeguard tribal and individual titles, when taken with other parts of the treaty, plainly evidence purpose on the part of the United States to help to create an independent permanent farming community upon the reservation." Id., 304 U.S. at 117-118, 58 S.Ct. at 798.

The Court, while recognizing that the Tribes were the beneficial owners of the reservation's timber and mineral resources, id., 304 U.S. at 117, 58 S.Ct. at 798, and that it was known to all before the treaty was signed that the Wind River Indian Reservation contained valuable minerals, nonetheless concluded that the purpose of the reservation was agricultural. The fact that the Indians fully intended to continue to hunt and fish does not alter that conclusion. October 4, 1868 Report to the President of the Indian Peace Commission; Report of Wyoming Territory Superintendent of Indian Affairs, October 11, 1870. See also Williams, Personal Recollections of Wash-A-Kie, Chief of the Shoshones, 1 Utah Historical Quarterly 101, 104 (1928) (the Shoshone left the reservation both before and after the treaty for better hunting and fishing grounds in Utah).

Agreements subsequent to the treaty acknowledge the continuance of non-agricultural activities on the reservation. The Brunot Agreement of 1872, 18 Stat. 291, 292, 43rd Cong., Sess. II, ch. 2 (1874); 1904 McLaughlin Agreement, Act of March 3, 1905, 33 Stat. 1016; 1896

Agreement, 30 Stat. 93. The reports of the Indian agents are replete with descriptions of and plans for other activities. Yet not one of the cited reports neglects to report also on the progress of the farming and ranching operations. The primary activity was clearly agricultural.

B. *Fisheries*

Reserved water rights for fisheries have been recognized where a treaty provision explicitly recognized an exclusive right to take fish on the reservation or the right to take fish at traditional off-reservation fishing grounds, in common with others. United States v. Winans, 198 U.S. 371, 384, 25 S.Ct. 662, 665, 49 L.Ed. 1089 (1905); Byers v. Wa-Wa-Ne, supra 169 P. at 122; United States v. Adair, supra 723 F.2d at 1408; Puyallup Tribe, Inc. v. Washington Department of Game of Washington, 433 U.S. 165, 175, 97 S.Ct. 2616, 2622, 53 L.Ed.2d 667 (1977); United States v. Lower Elwha Tribe, supra 642 F.2d at 1147; Confederated Salish and Kootenai Tribes of Flathead Reservation, Montana v. Flathead Irrigation and Power Project, supra 616 F. Supp. at 1294; Washington v. Washington State Commercial Passenger Fishing Vessel Association, supra 443 U.S. at 661, 99 S.Ct. at 3062.

Instream fishery flows have also been recognized where the Indians were heavily, if not totally, dependent on fish for their livelihood. United States v. Adair, supra 723 F.2d at 1409; Colville Confederated Tribes v. Walton, supra 647 F.2d at 48. In the case at bar, the Tribes introduced evidence showing that fish had always been part of the Indians' diet. The master, erroneously concluding that a reserved right for fisheries should be implied when the tribe is "at least partially dependent upon fishing," awarded an instream flow right for fisheries. The district court, however, finding neither a dependency upon fishing for a livelihood nor a traditional lifestyle

involving fishing, deleted the award. The district court did not err. The evidence is not sufficient to imply a fishery flow right absent a treaty provision.

C. *Mineral and Industrial*

The Tribes were denied a reserved water right for mineral and industrial development. All parties to the treaty were well aware before it was signed of the valuable mineral estate underlying the Wind River Indian Reservation. October 4, 1686, Report of Brevet Major C.C. Augur to the President of the Indian Peace Commission; Brunot Agreement, 18 Stat. 291, 292, 43rd Cong., Sess. II, ch. 2 (1874), United States v. Shoshone Tribe of Indians, supra 304 U.S. 111, 58 S.Ct. 794. The question of whether, because the Indians own the minerals, the intent was that they should have the water necessary to develop them must be determined, of course, by the intent in 1868. Neither the Tribes nor the United States has cited this court to any provision of the treaty or other evidence indicating that the parties contemplated in 1868 that a purpose of the reservation would be for the Indians to develop the minerals. The fact that the Tribes have since used water for mineral and industrial purposes does not establish that water was impliedly reserved in 1868 for such uses. The district court did not err in denying a reserved water right for mineral and industrial uses.

D. *Municipal, Domestic and Commercial*

A reserved water right for municipal, domestic and commercial uses was included within the agricultural reserved water award. Domestic and related use has traditionally been subsumed in agricultural reserved rights. See, e.g., United States ex rel. Ray v. Hibner, supra 27 F.2d at 911 (the treaties fixed the rights of the Indians—"to a continuous use of a sufficient amount of water for the irrigation of their lands, and domestic pur-

poses"); United States v. Powers, supra 305 U.S. at 533, 59 S.Ct. at 347 ("waters essential to farming and home making"). Practicably irrigable acreage (PIA) was established as the measure of an agricultural reserved water right in Arizona v. California, supra 373 U.S. at 601, 83 S.Ct. at 1498. The special master there indicated that PIA was the measure of water necessary for agriculture and related purposes. Report from Simon H. Rifkind, Special Master, to the Supreme Court 265-266 (December 5, 1960) quoted in Colville Confederated Tribes v. Walton, supra 647 F.2d at 48. The court properly allowed a reserved water right for municipal, domestic, and commercial use.

E. *Livestock*

For the reasons stated above, the district court did not err in finding a sole agricultural purpose for the reservation or in subsuming livestock use within that purpose.

F. *Wildlife and Aesthetics*

The special master awarded 60% of historic flows for wildlife and aesthetic uses, consistent with his determination that the purpose of the reservation was to be a permanent homeland. The district court deleted this award, reciting not only that the purpose was solely agricultural, but that insufficient evidence had been presented to justify an award for these uses. The district court did not err in holding that the Tribes and the United States did not introduce sufficient evidence of a tradition of wildlife and aesthetic preservation which would justify finding this to be a purpose for which the reservation was created and for which water was impliedly reserved.

The district court did not err in finding a sole agricultural purpose in the creation of the Wind River Indian Reservation. The Treaty itself evidences no other purpose, and none of the extraneous evidence cited is sufficient to attribute a broader purpose.

V

SCOPE OF THE RESERVED WATER RIGHT

A. *Groundwater*

The logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater. See Tweedy v. Texas Company, 286 F. Supp. 383, 385 (D. Mont. 1968) ("whether the [necessary] waters were found on the surface of the land or under it should make no difference"). Certainly the two sources are often interconnected. See § 41-3-916, W.S. 1977 (where underground and surface waters are "so interconnected as to constitute in fact one source of supply," a single schedue of priorities shall be made); Final Report to the President and to the Congress by the National Water Commission, Water Policies for the Future 233 (1973) (groundwater and surface water "often naturally related"); Cappaert v. United States, supra 426 U.S. at 142-143, 96 S.Ct. at 2071 (citing additional authority to this effect).

Acknowledging the above, we note that, nonetheless, not a single case applying the reserved water doctrine to groundwater is cited to us. The ninth circuit indicated that groundwater was reserved in United States v. Cappaert, 508 F.2d 313, 317 (9th Cir. 1974). The United States Supreme Court, however, found the water in the pool reserved for preservation of the pupfish was not groundwater but surface water, protected from subsequent diversions from either surface or groundwater supplies. Cappaert v. United States, supra 426 U.S. at 143, 96 S.Ct. at 2071. Nor have the other cases cited to us granted a reserved right in underground water. In Colville Confederated Tribes v. Walton, supra 647 F.2d 42, there is slight mention of the underground aquifer and of pumping wells, Id. at 52, but the opinion does not indicate that "their wells" are a source of reserved water

or even discuss a reserved groundwater right. Tweedy v. Texas Company, supra 286 F. Supp. 383, did not recognize a reserved groundwater right. Pueblo water rights, which include not only surface water but also groundwater "interrelated to the surface water as an integral part of the hydrologic cycle," State of New Mexico ex rel. Reynolds v. Aamodt, 618 F. Supp. 993, 1010 (D.N.M. 1985), do not apply here.

The district court did not err in deciding there was no reserved groundwater right. Because we hold that the reserved water doctrine does not extend to groundwater, we need not address the separate claim that the district court erred in determining that the State owns the groundwater. The State has not appealed the decision that the Tribes may continue to satisfy their domestic and livestock needs (part of the agricultural award) from existing wells at current withdrawal rates; therefore, we do not address that question.

B. *Exportation*

The district court held that "[t]he Tribes can sell or lease any part of the water covered by their reserved water rights but the said sale or lease cannot be for exportation off of the Reservation." The Tribes did not seek permission to export reserved water, and the United States concedes that no federal law permits the sale of reserved water to non-Indians off the reservation. Because of our holding on the groundwater issue, we need not address the separate constitutional attack on the prohibition of exportation of groundwater.

C. *Finality*

The instant decree made no provision for future modification. In Article 9 of the decree in Arizona v. California, the Court retained "jurisdiction of this suit for the purpose of any order, direction, modification of the decree, or any supplementary decree." Arizona v. Cali-

fornia, supra 460 U.S. at 617-618, 103 S.Ct. at 1391. The Court explained that "the Article was mainly a safety net added to retain jurisdiction and to ensure that we had not, by virtue of res judicata, precluded ourselves from adjusting the decree in light of unforeseeable changes in circumstances." Id., 460 U.S. at 622, 103 S.Ct. at 1393.

The statute authorizing this general adjudication, § 1-37-106, W.S. 1977, is in the Uniform Declaratory Judgments Act. Section 1-37-102, W.S. 1977, provides that "such declarations shall have the effect of a final judgment." Section 1-37-114, W.S. 1977, provides: "The Uniform Declaratory Judgments Act is remedial. Its purposes is to settle and to afford relief from uncertainty and insecurity * * *." This court has said that the separate statutory provisions for stream adjudications "evince the legislative purpose peradventure of cavil that the adjudication of a water right in favor of a claimant shall be final and binding, and that no further rights may be claimed by him over and above the award made in the adjudication." Campbell v. Wyoming Development Company, 55 Wyo. 347, 100 P.2d 124, 137, reh. denied 102 P.2d 745 (1940). We conclude that finality in this litigation is appropriate.

The Tribes have several avenues available to them should unforeseen future problems develop. Rule 60(a), W.R.C.P., provides relief from clerical errors. Rule 60(b), W.R.C.P., provides relief from other mistakes. In addition, § 1-37-110, W.S. 1977, provides supplemental relief:

> "Further relief based on a declaratory judgment may be granted. * * * If the application is sufficient the court, on reasonable notice, shall require any adverse party whose rights have been adjudicated by the declaratory judgment to show cause why further relief should not be granted."

Clearly the district court did not need to retain jurisdiction as a "safety net."

VI

QUANTIFICATION

A. *The Measure*

The measure of the Tribes' reserved water right is the water necessary to irrigate the practicably irrigable acreage on the reservation. In Arizona v. California, supra 373 U.S. at 600-601, 83 S.Ct. at 1498, a needs test was rejected as too uncertain, the Court opting instead for practicably irrigable acreage as the measure of a tribal agicultural reserved water right. Two subsequent non-Indian reserved water right cases, Cappaert v. United States, supra 426 U.S. 128, 96 S.Ct. 2067, and United States v. New Mexico, supra 438 U.S. at 702, 98 S.Ct. at 3015, indicate that necessity is the measure of a reserved water right. And in Washington v. Washington State Commercial Passenger Fishing Vessel Association, supra 443 U.S. at 686-687, 99 S.Ct. at 3075, the Court recognized the propriety of reducing the Indians' proportion of the fish harvest as their needs diminished. Nonetheless, the Court declined the invitation to reexamine the PIA standard in Arizona v. California, supra 460 U.S. at 625-626, 103 S.Ct. at 1394-1395, and reaffirmed the value of the certainty inherent in the practicably irrigable acreage standard. The district court was correct in quantifying the Tribes' reserved water right by the amount of water necessary to irrigate all of the reservation's practicably irrigable acreage.

B. *Future Lands*

The Tribes and the United States claimed a reserved water right for lands on the reservation not yet developed for irrigation, but which were in their view, practicably irrigable acreage. Counsel for the State, the Tribes and the United States agreed upon a definition of practicably irrigable acreage: "those acres susceptible to sustained irrigation at reasonable costs." The deter-

mination of practicably irrigable acreage involves a two-part analysis, i.e., the PIA must be susceptible of sustained irrigation (not only proof of the arability but also of the engineering feasibility of irrigating the land) and irrigable "at reasonable cost."

The United States presented evidence on all these factors to support its ultimate claim for 53,760 practicably irrigable acres (210,000 acre-feet/year), and Wyoming presented evidence in opposition. The special master recommended the following award of reserved water rights for future projects:

North Crowheart	34,993 acres
South Crowheart	4,238 acres
Arapahoe	3,437 acres
Riverton East	3,442 acres
Big Horn Flats	2,410 acres
	48,520 acres

The Amended Judgment and Decree corrected the Riverton East figure by reducing it to 3,019 acres, which resulted in the total final award being 48,097 acres.

1. Arability

Over Wyoming's objection that the land classes did not consider economic factors and were not sufficiently specific, the master adopted this system:

> "*Class 1*: Class 1 lands are of high quality for irrigation, and will yield high returns with minimum production and management costs.
>
> "*Class 2*: Class 2 lands are good quality with only minor deficiencies.
>
> "*Class 3*: Class 3 consists of fair quality lands having more serious deficiencies than Class 2 lands.

> "*Class 4*: Class 4 lands are of marginal quality for irrigation and are used mainly for shallow-rooted crops or pasture.
>
> "*Class 5*: Class 5 lands are those lands which have been placed into a deferred status pending further investigation. There were no lands included in a deferred status.
>
> "*Class 6*: Class 6 lands do not meet the minimum requirements for arability under the land classification standards used."

The land classification system was first utilized to determine all arable acres. The arable acreage was then analyzed from an engineering standpoint. The resulting irrigable acres were then subjected to stringent economic analysis, including cropping pattern and crop yield analysis. The economic analysis requirement was satisfied. Wyoming proposed no alternative land classification system. We approve the system adopted by the master, finding it reasonable and fair to the parties.

The master determined that the arable land base was 76,027 acres. Wyoming claims on appeal that the arability investigation did not meet Bureau of Reclamation Standards for 60% of the land as to the depth to barrier, maximum slope, hydraulic conductivity, barrier definition and maximum drain spacing standards. The special master accepted the approach of the United States as meeting its burden of establishing the land base for the determination of arability. There was substantial evidence to support this determination, and looking, as we must, only to the evidence of the United States, we affirm the master's finding of 76,027 acres of arable land base.

2. Engineering Feasibility

The State next attacks the design work of Dr. Woldzion Mesghinna, the United States' irrigation engineer, because he had never before designed a system for Wyoming lands and because none of the systems he had

designed were yet operational. Despite these complaints, Wyoming did not object to his admission as an expert witness. The questions raised go only to the credibility of the witness, not his competence. Credibility is for the trier of fact. State ex. rel. Workers's Compensation Division v. Colvin, Wyo., 681 P.2d 269 (1984); Crompton v. Bruce, Wyo., 669 P.2d 930 (1983); Matter of Altman's Estate, Wyo., 650 P.2d 277 (1982). The master praised Mesghinna's thorough work and found him not only credible, but "detached from any preconceived estimates of what should be the result." The State objected that Dr. Mesghinna's irrigation design contains some non-arable Class 6 lands, perhaps as much as 487 acres. Dr. Mesghinna explained: "In squaring off process, which you cannot escape in any work of this kind, we might have included a very small portion of Class 6 lands, and with the same token, we have omitted large lands which are classified as arable by HKM." Counsel for Wyoming did not contend before the special master that this invalidated the design work, but only that "it's remarkably important, Your Honor, because it will come up with respect to the question of [crop] yields." Wyoming has presented us no cogent argument to support the notion that including irrigation for some fields containing some Class 6 lands invalidates the design work. The climatological data determines water requirements which govern the irrigation system design. Dr. Mesghinna did not use inaccurate climatological data. Dr. Mesghinna testified that he had never received any of the old, inaccurate solar radiation data from the Lander Airport. Instead of relying on measurements of solar radiation, Dr. Mesghinna used four equations to calculate evapor-transportation, relying upon the ratio of actual to possible sunshine. The State had ample opportunity to directly challenge HKM, the United States' agricultural engineer, on the reliability of its work, but apparently chose not to do so. The special master correctly denied Wyoming's motion, made at the close of cross-examina-

tion, to strike Dr. Mesghinna's entire testimony for lack of foundation. The special master, after weighing the testimony, accepted Dr. Mesghinna's climate work and found that it satisfied "any burden of the United States to prove the claimate base for the engineering feasibility analysis. The State does not shift the burden back merely by asserting that greater efforts could have been made in the data collection." Credibility of the witness was for the trier of fact, and the master found the witness credible and his data reliable; we accept that finding.

The master did not abuse his discretion in accepting the engineering feasibility work which incorporated 35% project efficiencies rather than a 50% project efficiency. It is well established in Wyoming that it is appellant's burden to demonstate an abuse of discretion. Canyon View Ranch v. Basin Electric Power Corp., Wyo., 628 P.2d 530 (1981). An abuse of discretion is an error of law under the circumstances; it occurs where the court could not reasonably conclude as it did. Martinez v. State, Wyo., 611 P.2d 831 (1980). A ruling which shocks the conscience of this court is held to be an abuse of discretion. Waldrop v. Weaver, Wyo., 702 P.2d 1291 (1985). See also Walker v. Karpan, Wyo., 726 P.2d 82, 90 (1986).

The master determined that practicably irrigable acreage should be based on present standards. Mr. Floyd Bishop, former State Engineer, gave the following testimony as a water resource engineer for the State: "The overall efficiency, I think can reasonably be expected to be higher than [35%]. I think a close management and husbandry of the water resource will provide a 50% overall efficiency in projects of this kind." The special master rejected Mr. Bishop's testimony because his overall efficiency estimate did not have the components of application, distribution or conveyance efficiency, and properly found the United States' claim for unit and total diversion to be reasonable and supported by the evidence. He explained that Dr. Mesghinna's

> "water duty 'is quite low as compared to what is going out right now' in other areas around the Reservation."

The master, therefore, found:

> "35. The United States claim for unit diversion and total diversion is reasonable and supported by convincing and the better evidence, particularly since Dr. Mesghinna's average water duty is more restrictive than the present historic use in Water Division 3."

Upon the evidence, the master could reasonably accept the position of the United States and did not abuse his discretion in doing so.

The United States' evidence indicates that an adequate water supply is available to serve the future projects. Mr. Ronald Billstein, the United States' water resource planner, explained that any apparent shortages are manageble because available soil moisture or efficiency adjustments compensate for the shortage and thus there is no actual shortage for agriculture. The Wyoming model, on the other hand, which not only includes state-awarded water rights and reservoirs but includes in-stream flow as well as diversionary requirements, shows that two stream reaches would contain only 98% of the total United States claims. The master did not err because he did not award the total diversion request of the United States.

3. Economic Feasibility

The five future projects were reduced by 10% to compensate for potential error in the arable land base and then subjected to economic analysis. After deleting 10% from the acres satisfying the engineering feasibility determination (i.e., before the economic analysis) the special master found the following acreage within the projects feasible to irrigate:

North Crowheart	34,933 acres
South Crowheart	4,238 acres
Arapahoe	3,437 acres
Riverton East	3,442 acres
Big Horn Flats	2,410 acres
	48,520 acres

After economic analysis, the special master awarded reserved water rights for the following practicably (i.e., economically) irrigable acreage:

Project	Acreage	Diversion
North Crowheart	34,993	133,324 af/yr
South Crowheart	4,238	18,181 af/yr
Arapahoe	3,437	15,088 af/yr
Riverton East	3,442	15,837 af/yr
Big Horn Flats	2,410	6,507 af/yr
Total	48,520	188,937 af/yr

It is readly apparent that the master found economically feasible, or practicably irrigable, all the acres he found to be irrigable from an engineering standpoint. Wyoming has cited no evidence in the record indicating that the economic feasibility testimony does not apply to the acres the master found to be practicably irrigable.

The master properly accepted a 4% discount rate in determining economic feasibility. Mr. David Dornbusch, economist for the United States, testified that he used principles recommended by the Water Resources Council, that the correct rate was in the range of 2 to 4%, and that he used 4% in his calculations. He agreed that the better practice is to stay with the original rate even if the discount rate goes up during the project and that the WRC rate on the date he testified was up to 7⅛%. Wyoming would have us decide that there is no lawful basis for using a 4% discount rate instead of the 7⅛%

rate required on federal water projects in 1979. 42 U.S.C. § 1962d-17(a); 44 Fed.Reg. No. 210, October 29, 1979, 18 C.F.R. 70439. Yet the other economists who testified, Dr. Ronald Cummings for the Tribes, Dr. Stephen Goldfeld for the United States in rebuttal and Dr. David Brookshire for the State, did not use 7⅛%. The State's own witness did not rely on the regulatory rate of 7⅛%. Dr. Brookshire testified that a range of rates is more appropriate and said that a range of 4-11% was appropriate here. Dr. Cummings felt 2-4% would be proper. Dr. Goldfeld placed 2½% as the correct rate within his 1-4% range. After weighing the evidence, the master concluded "that the preponderance of the evidence clearly supports the conclusions of Mr. Dornbusch." The master could not accept the State's evidence because Brookshire improperly excluded the household rate and relied on the average, rathr than the marginal, rate. The master did not err in accepting Dornbusch's 4% discount rate.

The United States' crop yield rate was not without a competent foundation. The master criticized the approach of the State and found:

> "The future projects incorporate state of the art technology and improved approaches to irrigation farming not currently used by farmers in the area. Better technology and management makes higher yields reasonably foreseeable, and given evidence of current similar yields already obtained by farmers in the area, I find the preponderance of the evidence clearly supports the projections of the United States."

On cross-examination, Mr. James Jacobs, agricultural economist for the State, admitted that at least one farmer gets malt barley yields ranging from 90 to 115 bushels per acre. Mr. Douglas Agee for the State reported 100 to 115 bushels in the central area near Riverton. This alone would provide adequate support for Dornbusch's 100 bushel projection. In addition, Dornbusch interviewed 20 to 25 farmers and obtained recent averages from them.

He departed from the average 83.3 bushel figure for malt barley in the Agee Report (prepared for the State) because

> "in interviewing the farmers I thought pretty uniformly the progressive farmers who were conscientious about irrigating, fertilizing and using progressive techniques had for the most part entirely, all of them, had yields that were higher than Agee's. The most glaring difference was in malt barley, and for that reason I chose to depart from Mr. Agee's malt barley yield, but stick with his for others."

The crop yield figures were not without foundation.

That Mr. Dornbusch made no reduction in crop yield projections to account for the time necessary to bring the future project areas to full production does not invalidate the crop yield figures. The master correctly observed:

> "[Dornbusch] addressed the issue from the production cost side of the equation, increasing his per acre costs to account for the possibility of lower yields in the initial years of operation. I find this cost method reasonable and an acceptable solution to the matter and, therefore, make no alteration to the crop yield projections of the United States."

The master did not err in accepting Dornbusch's methodology and cost elements derived for on-farm production costs and management and labor costs. Dornbusch testified that his analysis of fixed costs was based upon the most efficient use of the equipment, rather than unit size, because under cooperative Indian management the equipment could be used on larger than normal farms. Doug Agee, for the State, challenged this to some extent: "They can become more efficient up to a limited size, and then that curve starts to back up." The master considered the conflicting testimony and determined that

> "the approach taken by Dornbusch [is the] more realistic, and his assumption of tribal cooperation on

> the projects is not only reasonable, but well supported by the preponderance of the evidence."

Sufficient evidence supports the use of Dornbusch's figures.

The United States' management and labor costs used only 20% of actual costs and assumed that unemployed Indians would supply labor. The disagreement between Dornbusch, for the United States, and Jacobs, for the State, was over what proportion of labor costs have a zero opportunity cost owing to high unemployment on the reservation. Dornbusch's 80% was derived from information from the BIA, interviews, and the historic experience on the reservation. Jacobs, who would cost farm labor at 75-100%, did less thorough work, relying on his own "judgment call." The United States' economist provided adequate foundation for his figures.

The master's determination that the Wind River Indian Reservation embraces practicably irrigable acreage is proper. We therefore affirm the district court's award of a reserved water right for future projects covering practicably irrigable acreage.

4. 10% Reduction

The master erred in reducing the award of a reserved water right by 10% on grounds that

> "[e]rror is probably inevitable whenever a group of people are required to coordinate and analyze such a complex matter [land classification] and must rely on a field of expertise which, by its very nature, lacks the certainty of complete objectivity. But that concern can be addressed by an appropriate percentage reduction in the totals to reflect the unavoidable errors that arise in such a study."

The master specifically found that the United States met its burden of proof in establishing the arable land base. Wyoming, he said, did not present a case sufficient to refute the evidence of the United States, but did raise "some concerns sufficient to support a percentage reduc-

tion." The master settled on a 10-15% reduction as appropriate and credited the United States with the 5% Dr. Mesghinna deducted for farmsteads and roads.

Even assuming there is a 10-15% margin of error in the United States' arable land base, it is clear that a margin of error works both ways. It is as likely the United States claimed 10-15% too few acres as arable as it is that it claimed 10-15% too many. Even counsel for the State referred to "the 10 percent *plus or minus* tolerance for accuracy." (Emphasis added.) The master found the United States had proved the arable land base by a preponderance of the evidence. Wyoming may have planted uncertainties in his mind, but by his own admission, they did not produce a preponderance of evidence to show that any particular acreage was not arable.

No independent evidence supports the reduction. The figures cited to us as evidence in support of the reduction are independent of any margin of error. We have already disposed of the claims that the United States' climatological data was without foundation, that the United States' efficiencies were reduced at trial, that a Wyoming witness said 50% efficiencies were possible, that another witness said only about 30,000 acres were irrigable, holding them insufficient to require a reduction in PIA. We addressed the inclusion of Class 6 lands and the squaring off process and resolved that claim adversely to Wyoming. Although Dr. Mesghinna admitted on cross-examination that his arable land might contain houses, cemeteries, dumps, gravel pits and the like, he also explained he had reduced the claimed arable land base by 5% to account for these. Thus, Wyoming has directed us to no independent evidence supporting the 10% reduction.

The master found (1) that the United States met its burden of proof on the arable land base, (2) that it proved engineering feasibility not only by a preponderance of the evidence, but as the most reasonable conclusion, (3) that it proved the diversion requirements "by convincing and the better evidence," (4) that its

cropping patterns were supported by the evidence and reasonable, (5) that its production costs were supported by the preponderance of the evidence, (6) that its incremental phase-in of the Indian management and normalization factor were supported by the preponderance of the evidence, (7) that it proved its reasonable discount rate by a preponderance of the evidence, and thus (8) that:

> "59. The claimants for a reserved water right have established their asserted case by a 'preponderance of the evidence,' which is the standard of proof clearly appropriate in this matter."

We have affirmed each of these findings. There should not have been a 10% reduction in the reserved water right, and we reverse that part of the decision.

5. Stagner Ridge and Big Horn Flats Extension

In addition to the future project lands the United States claimed as practicably irrigable acreage, the Tribe claimed a reserved water right for two additional projects, Stagner Ridge and Big Horn Flats Extension. It does not appear that these areas were denied a reserved water right because they were nonarable or even not feasibly irrigable from an engineering standpoint, so we will not address those questions. Rather the reserved water right was properly denied because the projects are not economically feasible.

Mr. Jack Keller, the Tribes' agricultural irrigation engineer, reduced the costs for these projects developed by Stetson Engineers for the United States by removing the roof from the pumping plant, but cutting materials costs and by reducing the sprinkler pressures. Keller did not analyze the canal systems and related structures. Lyman Willardson, irrigation and drainage engineer and field investigator for the Tribes, spent an inadequate amount of time in the field. In addition, Stetson Engineers, on whose expertise the master had relied in awarding acreage for the five future projects, chose not to in-

clude these two projects in the United States' claim on the basis of costs. Willardson testified that only by saving on the other five projects by reducing drainage, a practice dangerous to the productivity of the land, would the two extension projects become economical. Mr. Merrill testified for the United States that the bank of 9,000 hp pumps would increase the costs unacceptably for projects of this size. The master correctly concluded that the balance tipped away from the Tribes.

The comparable land approach to PIA rests on the fact that the lands in question are similar to other lands irrigated in the West, and so they, too, must be PIA. The master rejected this approach because Keller's cursory investigation of only one of the proposed project areas did not prove comparability. The comparable costs approach rests on the fact that if the costs are comparable to other projects, the acres are practicably irrigable. The per acre costs presented by the Tribes were well within the State's range for the five future projects. Nonetheless, the figures for the two extension projects were based on the cost-cutting the master rightfully condemned.

Nor does the Stagner Ridge Project meet the stipulated PIA definition. The master found the Tribes' witnesses not credible. Mr. Ronald Bleisner, the Tribes' irrigation engineer, admitted he sometimes followed instructions, not his conscience. Mr. Willardson, the Tribes' irrigation and drainage expert, was not credible because of his hasty investigation. Mr. Cummings' cost figures were incomplete; they did not include off-reservation costs. Stagner Ridge meets the PIA definition, with its cost/benefit ratio of 1.33, only if the cost figures are accepted. The master found them not credible and did not err in excluding Stagner Ridge and Big Horn Flats.

C. *Historic Lands*

The district court awarded a reserved water right for 54,216 practicably irrigable acres currently and/or his-

torically irrigated on the reservation, defining five types of historic lands:

(a) Adjudicated trust lands are lands with an uncancelled state permit or certificate of appropriation;

(b) Unadjudicated but currently irrigated trust lands are those being irrigated at the time of trial, but not carrying a state permit or certificate;

(c) Type VII trust lands are those previously irrigated but currently idle or retired;

(d) Type VIII trust lands are undeveloped arable lands, not currently irrigated but irrigable from existing canals (i.e., within or near project areas); and

(e) Indian fee lands are those owned in fee by individual Indians.

1. Presumptions

The master did not adopt improper presumptions relieving the United States and the Tribes from their burden of proving that the claimed historic acres met the stipulated definition of practicably irrigable acreage.

> "I believe my presumption of irrigability regarding these [historically irrigated] lands was fair and that all parties fairly understood it. Like any other presumption, it asserts that the factual picture is sufficiently strong as to require an opponent's answer."

The master held during the proceedings that an uncancelled state permit was prima facie evidence of irrigability. The district court accepted this holding.

There is no doubt that this presumption rests on reason. Quinlan v. Jones, 27 Wyo. 410, 198 P. 352, 354 (1921). We have no quarrel with the proposition that presumptions are not necessary where the facts are available or known, Porter v. Wilson, Wyo., 357 P.2d 309, 316 (1960); Castor v. Rice, 71 Wyo. 99, 254, P.2d 189, 191 (1953);

Kammerzell v. Anderson, 69 Wyo. 252, 240 P.2d 893, 895 (1952), but note that Wyoming also argues that the award for historic lands is improper because the facts were not known.

In a pretrial hearing the State of Wyoming agreed to the presumption when it argued, on behalf of individual private appropriators, that certificates of appropriation were prima facie evidence of a state water right and that the burden should be on the contestant to disprove a right to water. The state also argued that because it constantly monitors the water to be sure water is being used in accordance with the terms of the certificates, one cannot assume water is being wasted. The superintendent for Water Division No. 3 testified that he knew of no water rights in his division subject to abandonment and that he likely would know if there were. The State thus convinced the master that a certificate or permit is prima facie evidence that water is being put to beneficial use. The special master simply applied this reasoning to Indian lands as well, holding that the burden was on the State to show non-irrigability of Indian lands carrying a permit or certificate. Thereafter, Wyoming did attempt to prove that the claimed adjudicated acreage was not practicably irrigable, and in fact met its burden, convincing the master to delete some 5,017 acres of adjudicated lands. There is no merit to the contention that Wyoming did not fully understand the master's ruling that an uncancelled permit or certificate of appropriation was prima facie evidence of PIA.

The "presumption" concerning other historic lands was not a presumption at all. Rather, the master took evidence on arability, engineering feasibility and economic feasibility and found the United States' evidence to be "competent, generally convincing, and in most cases adequate in supporting Federal claims." As to the Tribes' claims for Indian fee land, the master found the evidence showed the land awarded a reserved water right to be

PIA. The evidence the master accepted was different from evidence used to prove PIA for the future projects but it was sufficient to meet the stipulated definition of PIA.

2. Adjudicated Lands

The United States was awarded a reserved water right for 12,395 of the claimed 17,411 acres of land within the reservation covered by an uncancelled state permit or certificate of adjudication. Sufficient evidence supports the finding that this acreage is economically feasible to irrigate. Mr. George Christopolous, then the State Engineer, testified for the State that a certificate does not represent a determination that the land is capable of sustained irrigation at reasonable cost. The United States performed no economic analysis for the adjudicated acres. Yet this court has defined beneficial use as the limit of water which can be economically used. Nicholas v. Hufford, 21 Wyo. 477, 133 P. 1084, 1087-1088 (1913). We have also indicated that a certificate is prima facie evidence of a water right. Basin Electric Power Coop. v. State Board of Control, Wyo., 578 P.2d 557 (1978); Quinn v. John Witaker Ranch Company, 54 Wyo. 367, 92 P.2d 568, 571-572 (1939); Laramie Irrigation and Power Company v. Grant, 44 Wyo. 392, 13 P.2d 235 (1932); Campbell v. Wyoming Development Company, supra 100 P.2d 124; Hamp v. State 19 Wyo. 377, 118 P. 653, 663 (1911). We have said that a certificate is evidence of current, as opposed to potential future, beneficial use. Green River Development Company v. FMC Corp., Wyo., 660 P.2d 339, 346 (1983). David Dornbusch, economist for the United States, testified that the fact that the land is being irrigated means it is economically feasible to do so. We acknowledge that the beneficial use standard for abandonment of a water right under state law is not identical to the definition of PIA, but emphasize that the fact that a state water right has not been abandoned for failure to beneficially use the water is a

strong indication that the land is being productively irrigated. Thus, the master and the court did not err in awarding a reserved water right for adjudicated lands without formal proof of economic feasibility. Furthermore, once the master correctly ruled that a permit or certificate is prima facie evidence of PIA, it was incumbent on the State to show specifically which areas were not PIA. Wyoming cites us to no evidence showing that any of the adjudicated lands for which an award was made were not economically feasible to irrigate. The court did not err in awarding a reserved water right for lands carrying a valid state water right.

The court nonetheless reduced the United States' claimed reserved water right for adjudicated lands, deleting a total of 5,017.1 acres as follows:

Type IX lands ("out" land types)	845.9 acres
Class 6 lands	2,971.7 acres
Class 6 lands	360.5 acres
Type VII (retired) lands	829.0 acres
Type VIII lands with no economic analysis	10.0 acres

The bases of the reduction were that Wyoming showed 5,007.1 acres to be nonarable by the United States' own standards and that the United States had not proved 10 acres of undeveloped land to be economically feasible to irrigate.

The master did not find the 2,971.7 acres of Class 6 lands to be nonarable only by finding that they could not be economically irrigated. We have already said that any economic analysis is a third step to determine whether arable lands can be economically irrigated; the fact that land can be economically irrigated does not make it arable. The special master adopted the United States' definition of Class 6 lands as "lands which do not meet the minimum standards or requirements for arability under the Land Classification Standards used by HKM, and are nonarable." Mr. Sommers, for the State, agreed

that Class 6 lands are by definition not arable. Language indicating that the master gave Wyoming the benefit of the doubt only indicates he found the State's witnesses credible in identifying 3,817 acres of Type IX and Class 6 lands. The master did not err in excluding these non-arable adjudicated lands.

The master deleted another 360.5 acres of Class 6 adjudicated trust lands. The 244.1 acres of Class 6 land are currently irrigated and thus economically feasible to irrigate. But we have said that the fact the land is economically feasible to irrigate does not make it arable. Thus there is no merit to the contention that the 244.1 acres were improperly excluded. As to the 116.5 acres, the master found the State's evidence that the acres were Type VII, currently idle lands, which were only possibly arable more credible than the HKM soil logs indicating the land is Class 3 or Class 4. The master could not add the 116.5 acres to the Type VII award because the necessary economic analysis had not been performed; therefore, he eliminated them. The court did not err in deleting these acres.

The master excluded 829.0 acres of Type VII land because he thought the United States did not show the land to be PIA with economic analysis. The record reflects that the United States did prove its case regarding these Type VII, not adjudicated, lands with economic analysis. But it is well established that this court will uphold the action of the district court for any proper reason appearing in the record. Anderson v. Bauer, supra 681 P.2d 1316; Mentock v. Mentock, supra 638 P.2d 156. And Mr. Sommers testified for the State that some 837.7 acres of Type VII land were not arable. Thus, the deletion of 829 acres was proper because the land was not arable.

The master and the court did not err in finding that the State rebutted the presumption of PIA for 5,017.1 acres of the 17,411 acres of adjudicated trust lands claimed by the United States.

3. Unadjudicated In-Use Lands

The United States received a reserved water right for 28,129 of the claimed 34,427 acres of unadjudicated, but currently irrigated, trust lands. The master found credible the testimony of Mr. F. T. Kersich of HKM Associates, agricultural engineer for the United States, that the land was arable. He was satisfied that physical and cultural obstacles to irrigation were adequately accounted for. He also accepted the testimony of Mr. Dornbusch, the United States' economist, that current successful irrigation indicates economic feasibility. Thus, there is sufficient evidence that the acres awarded a reserved water right are arable and economically feasible to irrigate.

Nonetheless, the master deleted a total of 6,298 acres. He refused to award a reserved water right for 3,575.9 acres of Class 6 land. The United States' claims that it is unfair to exclude Class 6 lands when such lands are in fact being irrigated in the Midvale and LeClair projects, and that the master "placed an insurmountable burden on the United States—to prove that what is done in fact is not impossible to do in theory," are not well taken. It was the United States which defined Class 6 land as not arable, and it was the United States which classified these 3,575.3 acres as Class 6 lands. Thus the United States has essentially admitted that these acres are not practicably irrigable and not entitled to a reserved water right. The court did not err in excluding these acres.

The master also deleted 879 acres for which the United States' soil logs contain notations "which discredit this irrigability." Mr. Sommers' testimony for the State pointed out that these notes question the arability of these acres. The master found this testimony credible and refused to strike it. The comments were: "doesn't appear to have been farmed"; "seeped • • • too expensive to drain"; "subject to flooding"; "many cobbles and bould-

ers on surface"; "poor land; water table is high"; "subirrigated"; "alkali on surface • • • subject to floods"; and "probably not used for irrigation." It is clear that this testimony and evidence support the deletion.

The court deleted 246 acres of subirrigated land. The master's deletion of 1,778 acres of subirrigated land was reduced by stipulation of the parties to a deletion of 246 acres in the Johnson Decree. The United States' own expert witness, Mr. Billstein, admitted that subirrigated land is nonarable. The court did not err in excluding these acres.

The master also deducted another 55.6 acres of Type VII, retired, lands. The land is not currently in use and because no economic analysis was done on it, it could not be included in the Type VII award. Mr. Sommers, testifying for the State that the acreage was idle, may have relied upon the wrong HKM log. Wyo. Exh. WRIR SS-1001 does identify tract 35-1 (55.6 acres) as Type IV, Class 4 land, but it also notes that the tract is "idle hayland." The United States does not indicate where the proper soil log is to be found in the record nor that Mr. Sommers was questioned about his use of an improper soil log at trial. Without some indication that this claim has merit, we will not consider it further.

The Tribes' argument that once actual irrigation is shown, the land should be considered to be PIA unless the use of water is demonstrated to be wasteful is not well taken. The State's showing that some of the claimed lands are not currently irrigated takes those acres out of the proposed rule. The finding that the remaining deleted acres are not arable means that they cannot meet the definition of PIA.

The master did not err in deleting 6,298 acres of the claimed 34,427 PIA, unadjudicated in-use trust lands.

4. Type VII Lands

The United States was awarded a reserved water right for 6,271 of the claimed 7,946 acres of Type VII, previously irrigated but currently idle, or retired, land. The master excluded 1,546 acres of Class 4 and Class 6 lands as "simply too marginal to be awarded a finding of practicable irrigable acreage." We have already said that Class 6 lands are not arable and must be excluded. Class 4 lands are "[l]ands of marginal quality for irrigation, suitable mainly for shallow rooted crops or pasture." The excluded acres were not classified as Class 6 for both gravity and sprinkler irrigation. Nonetheless, Mr. David Dornbusch, economist for the United States, eliminated even some Class 4 gravity—Class 4 sprinkler acres as economically unfeasible. Mr. Sommers testified for the State that additional acreage should be deleted because the United States relaxed its arability standards for these historic lands. Mr. Ross Waples, a United States land classifier and soil scientist, testified that the lands were properly designated Class 4 sprinkler only when "the conditions that would be required to make it arable are met, which are drainage and the [soil] amendments." The land conditions not being met, the master and the court were justified in deleting this Class 4 acreage as just too marginal.

The master also deleted 129.5 acres because they did not meet the United States' minimum size standards. Mr. Waples explained that the size of the parcel "is irrelevant if it can be operated as part of a larger field" and admitted that the size standards were not strictly followed. The difficulty with this practice is that, even when the small parcels were joined with other parcels for management purposes, they either did not meet the 40 acre parcel requirement or were separated by a fenced paved county road. The master did not err in eliminating these parcels.

5. Indian Fee Land

The Tribes claimed a reserved water right for a total of 10,374 acres of Indian fee lands—land on the reservation owned in fee by individual Indians—and proved that 6,155 acres were entitled to reserved water rights. The Tribes admit that the omitted 3,943 acres are not currently irrigated, and the testimony that Indian fee land was comparable to other reservation lands dealt only with irrigated lands. Thus there is no evidence to support inclusion of these non-irrigated lands even under the Tribes' comparable lands test for PIA.

The master did not accept these acres under the stipulated PIA definition because no economic analysis was performed. Keith Higginson, the Tribes' water resources engineer, testified that he believed the economic analysis was not necessary. The master implicitly agreed with him for the currently irrigated acres, but required the economic analysis for non-irrigated acres. The master did not rule that a formal benefit/cost analysis was necessary, only that some economic analysis was required. Yet Mr. Higginson merely assumed economic feasibility because "it was simply, in most cases, a matter of extending the ditch or a lateral in order to bring the water to the land." He did not opine as to the cost of such activities, nor show the relationship of the tracts to existing diversion works.

The master also disallowed 276 acres of Class 6 and subirrigated Indian fee land. For the reasons outlined supra, he did not err.

6. Efficiency Increase

In an irrigation system, the more efficient the use of water, the less water is needed. A system operating at 25% efficiency uses twice as much water as a system operating at 50%. In a 100% efficient system, the plants would use every drop of diverted water. The current average efficiencies for both project and non-project lands

is 35%; a 50% overall efficiency is probably achievable. The district court quantified the reserved water right for historic lands based on a 40% efficiency.

Sufficient evidence supports the increase. Mr. Bishop for the State testified that a 50% overall efficiency was achievable. Mr. Higginson for the Tribes testified 40% was possible with the use of hand-moved sprinklers. Mr. Thomas Stetson, water duty engineer for the United States, said better efficiency could be achieved without a large cost investment but with better management. Thus there is evidence to support the master's finding that a 5% increase in efficiency is acceptable.

The award does not interfere with the Tribes' right to administer their own affairs; it merely quantifies the reserved right for historic lands by awarding only the amount of water necessary to irrigate all the PIA. The master did not discriminate against the Indians; he had no power to order an efficiency increase for non-Indian users in Water Division No. 3. The Tribes will not lose 12½% of their reserved water right if they do not expend whatever funds or efforts are necessary to achieve a 40% efficiency; the amount of water awarded them was reduced under sound principles. It matters not that expensive modifications may be necessary in order that the Tribes can fully utilize the water awarded on all the historic PIA; expensive construction is necessary to irrigate the future PIA for which the Tribes have accepted water.

The court did not err in reducing the reserved water right for historic lands to the amount necessary to irrigate all the PIA based on an overall efficiency of 40%.

D. Sensitivity Doctrine

The sensitivity doctrine takes its name from this passage:

> "I agree with the court that the implied-reservation doctrine should be applied with sensitivity to its im-

pact upon those who have obtained water rights under state law and to Congress' general policy of deference to state water law." United States v. New Mexico, supra 438 U.S. at 718, 98 S.Ct. at 3023 (Powell, J., dissenting in part).

The majority in that case said:

"The quantification of reserved water rights for the national forests is of critical importance to the West, where, as noted earlier, water is scarce and where more than 50% of the available water either originates in or flows through national forests. When, as in the case of the Rio Mimbres, a river is fully appropriated, federal reserved water rights will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators. This reality has not escaped the attention of Congress and must be weighed in determining what, if any, water Congress reserved for use in the national forests." *id.*, 438 U.S. at 705, 98 S.Ct at 3016-3017.

The Court indicated that water is reserved only to fulfill the purposes of the reservation, id., 438 U.S. at 700, 98 S.Ct. at 3014, and that a careful examination of the purposes and the amount of water claimed is essential. Id., 438 U.S. at 700-702, 98 S.Ct. at 3014-3015. Yet in Arizona v. California, supra 460 U.S. at 625, 103 S.Ct. at 1395, the Court refused to reconsider the PIA standard in light of the holdings in New Mexico, supra, and in Washington v. Washington State Commercial Passenger Fishing Vessel Association, supra 443 U.S. 658, 99 S.Ct. 3055 (dealing with a right to take fish, not Indian reserved water rights). There is strong indication that New Mexico does not apply to Indian reserved water rights. F. Cohen, Handbook of Federal Indian Law 581-585 (1982 ed.). The ninth circuit has nonetheless gleaned useful guidelines from it for use in Indian reserved water cases. United States v. Adair, supra 723 F.2d at 1408. It is thus not clear whether the sensitivity

doctrine, requiring the quantification of reserved water rights with sensitivity to the impact on state and private appropriators, applies here.

Assuming, arguendo, that it does apply, we cannot accept the City of Riverton's argument that it was ignored by the district court. Neither the provision in the Amended Judgment and Decree eliminating the upstream storage requirement from the future projects award nor the award of the reserved water rights in acre-feet per year rather than cubic feet per second violate the sensitivity doctrine.

Deletion of the upstream storage requirement which was intended to protect appropriators from sudden depletion by the diversion of water for the five future projects does not manifest insensitivity to other water users. The doctrine of reserved water rights entitles the Indians to a certain quantity of water. The requirement that they must first construct storage facilities to supply their entitlement flies in the face of the object of the reserved water right—a prior entitlement to the waters. There is no indication that elimination of the storage requirement before diversion of future project waters will require a gallon for gallon reduction in the water available for other users.

The award of a reserved water right in acre-feet per year is an accepted means of award. Arizona v. California, 376 U.S. 340, 342-345, 84 S.Ct. 755, 756-758, 11 L.Ed.2d 757 (1964); Mimbres Valley Irrigation Company v. Salopek, 90 N.M. 410, 564 P.2d 615 (1977), aff'd sub nom. United States v. New Mexico, supra 438 U.S. 696, 98 S.Ct. 3012. The City has cited us no authority for the proposition that the mere form of an award of reserved water can violate the sensitivity doctrine.

Nor does this court's elimination of the 10% diversion reduction for future projects violate the sensitivity doctrine. The sensitivity doctrine does not preclude the award of a fair reserved water right.

In the case at bar, the purpose of the reservation for which water is reserved is narrow—agricultural only. The right was quantified based on PIA—the master and the court rejecting some 50,000 acres originally claimed by the United States and the Tribes. The Indians' claim was further reduced by requiring an efficiency increase in historic lands. All of this evidences a sufficient sensitivity to the water needs of other water users.

With the exceptions noted above, we affirm the quantification of the reserved water right.

VII

PRIORITY DATES

A. *Diminished Reservation*

We recognized earlier in this opinion that there was indeed a federal water right impliedly reserved for the Indians when the Wind River Indian Reservation was created by the 1968 Treaty. Therefore, we affirm the rulings below that the tribal diminished-reservation lands have a water right with a priority date of 1868.

B. *Indian Fee Lands*

The special master held that land within the reservation held in fee by individual Indians which never left Indian ownership held a priority date of 1868. In United States v. Powers, supra 305 U.S. at 533, 59 S.Ct. 344, the Court said it found nothing to show that Congress intended allottees be denied participation in the use of reserved water rights. See also Colville Confederated Tribes v. Walton, supra 647 F.2d 42; United States ex rel. Ray v. Hibner, supra 27 F.2d at 912. We affirm.

C. *Allottees' Grantees*

For many years the courts have struggled to define the water rights of those who succeed to the lands of Indians.

United States ex rel. Ray v. Hibner, supra 27 F.2d at 912. In Skeem v. United States, supra 273 F. 93, the court had held that Indian allottees were entitled to a reserved water right with a treaty priority date. The recognized rights of the successors were somewhat different from the rights of the allottee. The non-Indian successor

> "would, as grantee of the Indian allotments, be entitled to a water right for the actual acreage that was under irrigation at the time title passed from the Indians, and such increased acreage as he might with reasonable diligence place under irrigation, which would give him, under the doctrine of relation, the same priority as owned by the Indians." United States ex rel. Ray v. Hibner, supra 27 F.2d at 912.

United States v. Parkins, supra 18 F.2d 642, does not address any claim of right to divert water by virtue of succession to a reserved water right. In United States v. Powers, supra 305 U.S. 527, 59 S.Ct. 344, the Court refused to consider the successors' claim to a reserved water right, id., 305 U.S. at 533, 59 S.Ct. at 346-347, but did note that "[t]he respondents' claim to the extent stated is well founded." Id. 305 U.S. at 532, 59 S.Ct. at 346. In Colville Confederated Tribes v. Walton, supra 647 F.2d at 50, the court reiterated that Indian allottees have a reserved water right and relied upon United States v. Ahtanum Irrigation District, 236 F.2d 321, 342 (9th Cir. 1956), for the proposition that "non-Indian purchasers of allotted lands are entitled to 'participate ratably' with Indian allottees in the use of reserved water." The court defined the non-Indian successor's interest in three ways: The successor cannot acquire a reserved water right for more PIA than the Indian owned; the successor's water right carries a treaty priority date; the successor's right is to the quantity of water being put to use by the Indian at the time title passes and to the water he puts to use with reasonable diligence there-

after. Colville Confederated Tribes v. Walton, supra 647 F.2d at 51. See also id., appeal after remand, 752 F.2d 397, 401-402 (9th Cir. 1985). The court also held that the state permits Walton held were "of no force and effect," because the State had no authority over water on the reservation. In a footnote to the opinion, the court begged the United States Supreme Court to review the case so that "guidance and stability" might be given the issue of allottees' successors rights, "an area of great unrest and uncertainty in Western water and land law." Colville Confederated Tribes v. Walton, supra, 647 F.2d at 54 n.18. Yet the Court has twice denied certiorari. 454 U.S. 1092, 102 S.Ct. 657, 70 L.Ed.2d 630 (1981); 475 U.S. 1010, 106 S.Ct 1183, 89 L.Ed.2d 300 (1986). In United States v. Adair, supra 723 F.2d 1394, the court reiterated that a non-Indian purchaser may succeed to the full quantity of water available to the allottee, id. at 1417, and held that the United States, as a non-Indian successor, also succeeded to the same appurtenant water rights. Id. at 1419.

In United States v. McIntire, 101 F.2d 650 (9th Cir. 1939), the court held that the state water rights procured by the Indian predecessor conferred no valid water right. Likewise, Colville Confederated Tribes v. Walton, supra 647 F.2d at 51, held that the state permits issued for lands carrying a reserved water right were "of no force and effect." We hold that the mere fact that state permits have been issued does not deprive these allottees' successors of a reserved water right with a treaty date priority.

Merrill v. Bishop, supra 287 P.2d 620, was a suit by allottees' successors to enjoin the state engineer from interfering with their headgates. Id. at 620. The actual holding in the case was that the injunction must be denied because the successors had not proved the facts necessary to allow the courts to tailor an injunction. Id. at 626. It is thus apparent that the master relied only on dicta in Merrill v. Bishop. The holding of that case

is narrow and does not prevent relitigating what was not necessary to the decision. Rialto Theatre, Inc. v. Commonwealth Theatres, Inc., Wyo., 714 P.2d 328 (1986); CLS v. CLJ, Wyo., 693 P.2d 774 (1985). We have already decided that the admission of Wyoming to the Union did not abrogate reserved water rights for the reservation. To the extent that Merrill v. Bishop indicates otherwise, it is overruled. Merrill v. Bishop is not res judicata of Webber, Jones and Graboski's claim to a treaty priority date. We have also held that state permits issued for water which has been reserved are invalid. Thus, the administrative proceedings are not res judicata.

On remand, appellants must be awarded a reserved water right with an 1868 priority date for the PIA they can show were irrigated by their Indian predecessors or put under irrigation within a reasonable time thereafter.

D. *Reacquired Lands*

We have already held that a non-Indian purchaser from an Indian allottee obtains a reserved water right with a treaty priority date, and that his non-Indian successor would likewise succeed to the treaty priority date. There is no reason then to deny the same priority to an Indian or tribal purchaser. Because all the reacquired lands on the ceded portion of the reservation are reservation lands, the same as lands on the diminished portion, the same reserved water rights apply. Thus, reacquired lands on both portions of the reservation are entitled to an 1868 priority date.

VIII

MONITORING OF THE DECREE BY THE STATE ENGINEER

The issue of whether the state engineer may monitor the decree is a controversy conferring jurisdiction upon this court. A letter from Wyoming to Judge Johnson which referred to "[t]he federal government's residual

dissatisfaction with Judge Joffee's ruling that the State Engineer shall have primary regulatory responsibility" indicates previous disputes as to the propriety of the ruling. Section 4 of the United States' response confirms the contested nature of the issue. Sufficient adversary character exists to permit a ruling on this question. Brimmer v. Thomson, Wyo., 521 P.2d 574, 577 (1974).

The decree does not violate state law. The provision in the Amended Judgment and Decree does not purport to give full ownership of the reserved water to the State. Thus the argument that the decree divests the Tribes of their water in violation of Article 1, § 32 (eminent domain) of the Wyoming Constitution is inapposite because monitoring by the state engineer is not a taking of property. Article 8, § 1 of the Wyoming Constitution provides that the water is the property of the state and Article 8, § 5 provides that the state engineer has general supervision of the waters of the state. Because Congress, in admitting Wyoming to the Union, 26 Stats. 222, ch. 664, ratified the Wyoming Constitution, it clearly contemplated that whatever superior rights it might temporarily or permanently hold in the waters of this state, the underlying ownership and control would remain with the State. Thus the decree does not violate Article 21, § 1 (rights to continue after statehood) nor does the decree run afoul of Article 21, § 26, which disclaims all right and title to lands owned by Indians until title is extinguished by the United States and provides that Indian lands remain under the absolute control and jurisdiction of Congress, emphasizing that Indian rights remain only so long as the reservation exists. Our Declaratory Judgments Act, permiting the court to enter all necessary orders, § 1-37-106, W.S. 1977, is to be liberally construed to give effect to its remedial purposes and relief from uncertainty. Section 1-37-114, W.S. 1977; Brimmer v. Thomson, supra 521 P.2d at 577. Neither the United States nor the Tribes have advanced other au-

thority for the proposition that the provision violates state law.

Federal law has not preempted state oversight of reserved water rights. In Arizona v. San Carlos Apache Tribe of Arizona, supra 463 U.S. 545, 103 S.Ct. 3201, the Court merely reiterated that Indian water rights in state adjudications must be judged by federal law. In Cappaert v. United States, supra 426 U.S. at 145, 96 S.Ct. at 2073, the Court said: "Federal water rights are not dependent upon state law or state procedures and they need not be adjudicated only in state courts." The procedures referred to are state procedures for perfecting state water rights, not monitoring of already decreed federal water rights. See Colville Confederate Tribes v. Walton, supra 752 F.2d at 400 (federal law governs only scope and volume of reserved right). United States v. Rio Grande Dam and Irrigation Company, 174 U.S. 690, 19 S.Ct. 770, 43 L.Ed. 1136 (1899) dealt only with interference with a navigable stream, and United States v. McIntire, supra 101 F.2d at 654, held a state appropriation of reserved water to be invalid. In Colville Confederated Tribes v. Walton, supra 647 F.2d 42, the court indicated that state administration of the No Name System was inappropriate because the system was entirely within the reservation, but conceded that state regulation may be appropriate in some circumstances. Id. at 52-53. The ninth circuit later conceded that the State could assume some regulatory authority on the reservation. United States v. Anderson, 736 F.2d 1358, 1365 (9th Cir. 1984). See also Federal Youth Center v. District Court in and for the County of Jefferson, 195 Colo. 55, 575 P.2d 395, 400 (1978) (Congress intended to defer to state administration); United States v. City and County of Denver, Colo., 656 P.2d 1, 35 (1982) (U.S. agrees adjudicated federal reserved water rights subject to administration by state engineer); United States v. Bell, Colo., 724 P.2d 631, 644 (1986) (U.S. must submit to state administration). The decree entered in the instant

case does not require application of state water law to the Indian reservation. The decree recognizes reserved water rights based on federal law. The role of the state engineer is thus not to apply state law, but to enforce the reserved rights as decreed under principles of federal law. This court is also cognizant of the fact that exercise of the reserved water rights are intimately bound up with the state water rights of off-reservation users. The state water appropriators are not in a position to jeopardize the decreed rights of the Tribes. The decree only requires the United States and the Tribes first to turn to the state engineer to exercise his authority over the state users to protect their reserved water rights before they seek court assistance to enforce their rights; it does not preclude access to the courts. Incidental monitoring of Indian use to this end has carelessly been termed "administration" of Indian water by the state engineer. Should the state engineer find that it is the Tribes who are violating the decree, it is clear that he must then turn to the courts for enforcement of the decree against the United States and the Tribes and that he cannot simply close the headgates. United States v. Hampleman, supra No. 753, June 26, 1916. Any fear that the state engineer may be unfair must be dispelled by Article 1, § 31 of the Wyoming Constitution which provides that the State "shall equally guard all of the various [water] interests involved." The state engineer has sworn to uphold this constitution. Thus it is readily apparent that the provisions authorizing the state engineer to monitor reserved water rights contemplate neither the application of state law nor the authority to deprive the Tribes of water without the assistance of the courts in a suit for the administration of the decree.

The argument that the instant decree can be administered only by the court in a separate suit for administration under the McCarran Amendment must fail in light of the admission that an independent water master might properly be appointed at this time to administer

the decree and in light of the state engineer's limited authority. The Treaty of 1868 prohibits only unauthorized persons from entering the reservation, but the state engineer would be an authorized person upon his appointment to monitor the decree and could properly enter the reservation.

The district court did not err in including provisions giving the state engineer authority to enforce the decree against state appropriators.

IX

EXPENSES OF THE SPECIAL MASTER

The partial interlocutory decree settling the non-Indian federal reserved rights was final, under Rule 54(b), W.R.C.P., only as to Phase II, non-Indian federal reserved water rights. Nor could an appeal have been taken from the original orders to pay. The United States' timely notice of appeal from the May 24, 1985 Amended Judgment and Decree is sufficient to challenge all aspects of the Phase I proceedings, and we address the merits of the issue.

The McCarran Amendment prohibits taxing of costs against the United States: "[N]o judgment for costs shall be entered against the United States in any such suit [for the adjudication or administration of water rights]." 443 U.S.C. § 666. Rule 54(d), F.R.C.P., provides that "costs against the United States • • • shall be imposed only to the extent permitted by law." Likewise, Rule 54(d), W.R.C.P., provides that "costs against the state of Wyoming • • • shall be imposed only to the extent permitted by law." Both the federal and state rules provide that "compensation to be allowed the master shall be fixed by the court, and may be charged against such of the parties • • • as the court may direct." Rule 53(a), W.R.C.P.; Rule 53(a), F.R.C.P.

A number of federal cases have indicated that costs include the special master's fees and expenses. Norris v. Green, 317 F.Supp. 100 (N.D.Ala. 1965); K-2 Ski Co. v. Head Ski Co., Inc., 506 F.2d 471 (9th Cir. 1974); Capra, Inc. v. Ward Foods, Inc., supra 567 F.2d 1316 (5th Cir. 1978), overruled on other grounds Cooper Liquor, Inc. v. Adolph Coors Co., 701 F.2d 542 (5th Cir. 1983). It is apparent, however, that the reason for this practice is to give the district court discretion as to whether to charge the losing party the entire master's bill. Capra, Inc. v. Ward Foods, Inc., supra, 567 F.2d at 1323-1324; Gary W. v. Louisiana, 601 F.2d 240 (5th Cir. 1979). Costs are generally considered to be the expenses incurred by the litigant, not the court system. 6 Moore's Federal Practice, ¶54.70 at 54-317 (1986). See also Rule 39(e), F.R.A.P. (including as taxable costs the preparation and transmission of the record and necessary transcripts, filing fees, and premiums paid for appeal bonds); Black's Law Dictionary at 312 (5th ed. 1979) ("Fees and charges required by law to be paid to the courts or their officers, the amount of which is fixed by statute or court rule; e.g., filing and service fees"). Therefore, assessing master's fees does not run afoul of the McCarran Amendment.

The United States was not the subject of discrimination because it was the only party other than Wyoming which was required to bear the expenses and fees of the master. Even in original proceedings before the United States Supreme Court, the practice is to allocate the master's compensation among the states and the United States. Arizona v. California, 351 U.S. 977, 76 S.Ct. 1042, 100 L.Ed.2d 1493 (1956).

In the case at bar, the United States insisted upon the appointment of a special master, arguing that the Board of Control could not be objective. Even though objection was groundless, the court appointed a master in order to insure the procedural integrity of the judgment. It was

not unreasonable to require the United States to pay one-half of the master's fees and expenses under such circumstances. In Equal Employment Opportunity Commission v. International Union of Elec., Radio and Mach. Workers, AFL CIO, CLC, Local 758, 631 F.2d 81 (6th Cir.), cert. denied 449 U.S. 1010, 101 S.Ct. 565, 66 L.Ed.2d 468 (1980), the court affirmed the district court's order for the union to pay one-third of the master's expenses because the union had filed no objection to the appointment of the master and because the union had taken an active part in the litigation. In Gary W. v. Louisiana, supra 601 F.2d at 242-244, the court affirmed the order for the State to pay all the master's fees, despite its objection to the appointment of the master, because its failure to comply with the original injunction necessitated the appointment of the master to monitor implementation of the injunction. Where the reference to the master was at the defendant's request and over the plaintiff's objection, and where, as here, the party requesting the reference made no convincing showing that any serious prejudice would result if the reference were denied, it was proper to charge the defendant at least half of the expense of the reference. Johnson Fare Box Company v. National Rejectors, Inc., 269 F.2d 348 (8th Cir. 1959). See also 9 C. Wright & A. Miller, Federal Practice & Procedure, § 2608 at 798 ("If a reference was unnecessary it is quite common to make the party who induced the court to order a reference bear the expense of the reference"). No provision for the payment of fees was attached at the foot of the original reference to the Board of Control simply because there is no authority for assessing the fees and expenses of the Board.

The district court did not err in requiring the United States to pay one-half of the special master's fees and expenses.

X

CONCLUSION

The Amended Judgment and Decree is affirmed in part, reversed in part, and remanded to the district court for further proceedings consistent with this opinion.

THOMAS, Justice, dissenting with whom HANSCUM, District Judge, joins.

I differ from the majority with respect to three propositions and must dissent from the disposition made in the majority opinion. Except for my three points of difference, I am in accord with the resolution of this case as set forth in that opinion. My three points of difference are: first, I do not agree that reserved water rights, to the extent that they properly are recognized under the reserved rights doctrine, should be limited in the manner suggested by the majority opinion; second, I believe that there should be a pragmatic limitation on the standard for quantification, the practicably irrigable acreage, which would eliminate those lands from the quantification formula which only could be irrigated by the construction of some future water project; and third, but most important, I do not believe that the reserved rights doctrine is applicable to that portion of the lands lying north of the "Big Wind River," (i.e., the ceded portion of the Wind River Indian Reservation.

The purpose of establishing an Indian reservation, such as the Wind River Indian Reservation, is to provide a homeland for Indian peoples. If one is to assume that, pursuant to the reserved rights doctrine relating to water, there is an implied reservation of those waters essential to accomplish the purpose of the reservation of land, then I cannot agree that the implied reservation of water with respect to the Wind River Indian Reservation should be limited, as the majority has held in approving the judgment of the district court. The fault that I find with such a limitation is that it assumes that the Indian peoples will not enjoy the same style of evolution as other people, nor are they to have the benefits of modern civilization. I would understand that the homeland concept assumes that the homeland will not be a static place frozen in an instant of time but that the homeland will evolve and will be used in different ways as the Indian

society develops. For that reason, I would hold that the implied reservation of water rights attaching to an Indian reservation assumes any use that is appropriate to the Indian homeland as it progresses and develops. The one thing that I would not assume is that using the reserved water as a salable commodity was contemplated in connection with the implied reservation of the water. I would limit its use to the territorial boundaries of the reservation.

Deeming it unnecessary to detail further the formula for allocation of water which involves the concept of practicably irrigable acreage (Arizona v. California, 460 U.S. 605, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983)) I am convinced that there has to be some degree of pragmatism in determining practicably irrigable acreage. It is clear from the majority opinion that there was included in quantifying the water reserved to the Indian peoples lands not now irrigable but deemed to be practicably irrigable acreage upon the assumption of the development of future irrigation projects. I would be appalled, as most other concerned citizens should be, if the Congress of the United States, or any other governmental body, began expending money to develop water projects for irrigating these Wyoming lands when far more fertile lands in the midwestern states now are being removed from production due to poor market conditions. I am convinced that, because of this pragmatic concern, those lands which were included as practicably irrigable acreage, based upon the assumption of the construction of a future irrigation project, should not be included for the purpose of quantification of the Indian peoples' water rights. They may be irrigable academically, but not as a matter of practicality, and I would require their exclusion from any quantification. For my purposes, this may be a moot point because I believe that hardly any of these lands are situated in the diminished portion of the Wind River Indian Reservation, the only lands to which reserved water rights can be attached.

My third concern is the error which has been committed in including lands north of the "Big Wind River" in the practicably irrigable acreage utilized for determining the quantification of the reserved water rights of the Indian peoples. In my judgment, the majority has ignored the significance of precedent from this court, to which we should accord priority; has failed to recognize the specific treaty history attaching to the Wind River Indian Reservation; and has failed to perceive the rationale of federal authorities addressing the disestablishment of Indian reservations. I would hold that the ceded lands have not been a part of an Indian reservation since 1905; and, since the reserved rights doctrine relating to an implied reservation of water rights depends upon the existence of reserved federal lands, there are no reserved water rights which attach to the ceded portion of the Wind River Indian Reservation. The United States Congress declared that the Indian peoples did not need these lands for the purpose of furnishing them a homeland; and, if that purpose is not present, there cannot be any implied reservation of water.

Turning first to the precedent of our court because of the doctrine of stare decisis, on several occasions, we have addressed the implications of the Act of March 3, 1905, 33 Stat. 1016 (hereinafter Act of March 3, 1905), which approved the Second McLaughlin Agreement, negotiated with the Wind River Indian Reservation Shoshone and Arapahoe Tribes. Our decisions uniformly demonstrate recognition of state jurisdiction over the lands of the ceded portion of the Wind River Indian Reservation." In some instances, we relied upon the concept of "Indian country." In this extraordinarily complex area of law, it seems important to promote rationality, if possible, and I would espouse a rule that for all practical purposes an "Indian homeland" and "Indian country" are one and the same.

In Merrill v. Bishop, 74 Wyo. 298, 287 P.2d 620 (1955), this court held that water rights appurtenant to

lands situated in the ceded portion of the reservation could be perfected only by compliance with the statutory requirements of the State, thus unequivocally asserting jurisdiction over the management of water on the ceded portion of the reservation. The court expressed some doubt as to whether the reserved rights doctrine as to implied water rights, articulated in Winters v. United States, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908), pertained to the Wind River Indian Reservation, in light of Art. 8, § 1 of the Constitution of the State of Wyoming, which declares all water within the boundaries of the State to be the property of the State, and the adoption of that constitutional provision by the United States Congress in the Act of Admission, Act of July 10, 1890, 26 Stat. 222. The decision, however, was not premised on such broad grounds. The court said:

> "* * * And so we do not pass upon the right of the United States or the Indians in so far as it concerns water and lands that still remain within an Indian reservation. The federal government being in absolute control thereof and having complete jurisdiction there, the federal courts may hold that the water rights were impliedly reserved notwithstanding the broad language contained in the act of admission of Wyoming. * * * The lands involved in this action became a part of the public domain when Congress on March 3, 1905, approved the treaty of 1904. Furthermore, there is no evidence in the case that any of the Indian allotments here in question were granted prior to that time. So it is not necessary to consider what the law would be if these allotments had been granted while the lands herein involved were still contained in an Indian Reservation. It would seem then that the power to grant allotments after March 3, 1905, remained pursuant to that treaty, but only just as a power existed to acquire a homestead in that area, each with the qualification that water rights could be acquired only by

> appropriation thereof with a priority according to the time of the appropriation. If that were not so then if it should happen that there are still lands within the ceded area of 1904 that might now be allotted to Indians, he or they would then have a water right superior to all the rights acquired by appropriation during the last 75 years. To do so hold would, we think, go beyond the mere protection of the weak against the strong. While Indian rights are to be regarded favorably, that should be done within reasonable limits. That the Indian allottees herein were not ignorant of the laws of appropriation of water is clearly demonstrated by the evidence in this case." Merrill v. Bishop, supra, 287 P.2d at 625.

The question in Blackburn v. State, Wyo., 357 P.2d 174, reh. denied 357 P.2d 1111 (1960), was criminal jurisdiction within the lands ceded pursuant to the Act of March 3, 1905. The argument was made that those lands were "Indian country," and thus, the State of Wyoming had no criminal jurisdiction. The distinctive feature in Blackburn v. State, supra, was that the area in issue was located on the Riverton Irrigation Project, and compensation was authorized for those specific lands by the Act of August 15, 1953, 67 Stat. 592. Congress there provided for the sum of $1,009,500 to be credited and expended for the benefit of the Shoshone and Arapahoe Indians of the Wind River Indian Reservation:

> "* * * [T]o constitute full, complete, and final compensation, except as provided in section 5 of this Act, for terminating and extinguishing all of the right, title, estate, and interest, including minerals, gas and oil, of said Indian tribes and their members of, in and to the lands, interests in lands, and any and all past and future damages arising out of the cession to the United States, pursuant to the Act of March 3, 1905 (33 Stat. 1016) of that part of the

former Wind River Indian Reservation lying within the following described boundaries: * * *."

In Blackburn v. State, supra, this court noted that the Act of August 15, 1953, 67 Stat. 592, was amended by the Act of August 27, 1958, 72 Stat. 935, which provided, in pertinent part:

"* * * [A]ll of the right, title, and interest of the United States in all minerals, including oil and gas, the Indian title, to which was extinguished by the Act of August 15, 1953 * * * is hereby declared to be held by the United States in trust for the Shoshone and Arapahoe Tribes * * *."

We held that any retained mineral interest for the Indian peoples, held in trust by the United States, did not suffice to make the lands "Indian country" as that term is used in 18 U.S.C.A., §§ 1151-1153. This court ruled that, despite a retained interest in mineral proceeds, Congress had extinguished Indian title to the ceded lands.

"* * * Construing the Acts of Congress together, we think, as the trial court held, that the title of the Indians to the lands in the territory here involved has been extinguissed and that the only right reserved to the Indians is in the money or proceeds received by the United States from the sale or lease of any rights in the land." Blackburn v. State, supra, 357 P.2d at 179.

While this court did rely, in part, on the effect of congressional acts, other than the Act of March 3, 1905, in deciding Blackburn v. State, supra, it is clear that the same decision would have been reached relying solely on that Act. We quoted from Application of De Marrias, 77 S.D. 294, 91 N.W.2d 480, 482-483 (1958), as follows:

"'* * * It is provided in the Act of Congress ratifying the agreement of 1889: "That the lands by said

agreement ceded, sold relinquished, and conveyed to the United States shall immediately, * * * be subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, *and be subject to the laws of the State wherein located*: * * *." Section 30, Chapter 543, 1891 (26 United States Statutes at Large, p. 1039).

* * *

"'It is readily apparent therefrom that the City of Sisseton is not situated on "land within the limits of any reservation." Consequently it is not within the purview of the term "Indian country" as defined and used in Section 1151, 1152, and 1153 of Title 18 U.S.C.A.'

"The foregoing italicized words are not contained in the Congressional Act of March 3, 1905, but we think that the intent is not different. See also Tooisgah v. United States, 10th Cir., 186 F.2d 93 [1950]. The instant contentions of appellants are overruled." Blackburn v. State, supra, 357 P.2d at 179-180. (Emphasis in original.)

A very similar jurisdictional question arose in State v. Moss, Wyo., 471 P.2d 333 (1970). The situs of the crime in that case was on property within the town of Riverton, Wyoming, which is situated on a portion of the lands ceded under the Act of March 3, 1905, and the court consistently held that Wyoming had jurisdiction over such lands which had not been returned to tribal ownership. The district court had dismissed a criminal information charging Moss, ruling that the State of Wyoming lacked jurisdiction over an Indian person in the town of Riverton. The State brought a bill of exceptions which this court sustained, holding that jurisdiction did exist. The court said:

> "Ramified as is the recounted legislative and treaty history of the original reservation, the solution of our problem turns on two points, was the treaty and 1905 Act a disestablishment of the reservation as to portions ceded, and if so, what was the effect of the 1939 Act." State v. Moss, supra, 471 P.2d at 335.

This court did not give controlling effect to Blackburn v. State, supra, saying:

> "• • • There a different area, a portion of the Riverton reclamation project, was under consideration; and while that site had been a part of the cession effected by the 1905 Act, it had also been the subject of the 1953 Act providing compensation to the Shoshone and Arapahoe Tribes 'deemed to constitute full, complete, and final compensation, • • • and extinguishing all of the right, title, estate, and interest • • • to the lands • • •.'" State v. Moss, supra, 471 P.2d at 337.

Instead, the court limited its rationale to the effect of the Act of March 3, 1905 and held that, despite Art. 9 of that statute, which created a trust relationship in favor of the Shoshone and Arapahoe tribes by the United States, Indian title had been extinguished as to the ceded portion of the Wind River Indian Reservation. The court quoted from United States v. La Plant, 200 F. 92 (D.C. S.D. 1911), the part in which the federal court had addressed earlier the effect of a provision very similar to Art. 9 of the Act of March 3, 1905:

> "'• • • That section declares that the United States does not guarantee to find a purchaser for the land, does not agree to buy the land, and acts only as trustee. But a trustee has not only the legal title, but he has also the right to possession, and the fact that the government is to act as trustee for the Indians does not indicate that their title has not been extinguished. There is nothing in section 9 providing

> that if the land is not sold it shall be turned back to the Indians. The government simply agrees to hold the money realized from the sale of the land, whenever it receives it, for the benefit of the Indians.'" State v. Moss, supra, 471 P.2d at 337, quoting United States v. La Plant, supra, 200 F. at 94.

This court also quoted favorably from State ex rel. Hollow Horn Bear v. Jameson, 77 S.D. 527, 95 N.W.2d 181 (1959), which had construed an act "parallel" to the Act of March 3, 1905, relying on United States v. Pelican, 232 U.S. 442, 34 S.Ct. 396, 58 L.Ed. 676 (1914), and Putnam v. United States, 248 F.2d 292 (8th Cir. 1957). The adopted language states that the Act (36 Stat. 440), described by our conduct to be parallel to the Act of March 3, 1905:

> "'* * * [W]as motivated by a congressional purpose to reduce the area of Pine Ridge * * *. In effect it separated the reservation into two parts. That which the act denominates as the "diminished" reservation, and which we elect to refer to as the "closed" portion of the reservation, was to remain unchanged and to continue to serve the purposes of the government in protecting and dealing with the whole Indian population of the reservation as in the past. The remainder of the reservation, which we will refer to as the "open" portion of the reservation, was to undergo change through a process of settlement into homesteads and townsites. It was contemplated that most of this surplus area would ultimately be settled, patented in fee, and cease to be a part of the reservation and within Indian country. There is no indication that allotted lands in this open area were reserved and excepted to serve the interest of the Pine Ridge Indians as a whole. It seems apparent that the principal reason for reserving these scattered outlying tracts was to permit the government to respond completely to its obligations to the respective allottees

> of these tracts. It is equally apparent that as the Indian title to each of these tracts was extinguished they would cease to serve in furthering any phase of the functions of the government in ministering unto its Indian wards. Thereafter such a tract would bear no different relation to those functions than would an adjoining tract of the open area, the Indian title to which had been extinguished by a homestead patent to a settler. Because the Congress obviously did not contemplate the use of these outlying allotted tracts for any purpose in connection with the superintendence and protection of its Indian wards after the Indian title thereto had been extinguished, we are persuaded that after such an extinguishment it intended they would cease to be both a part of the reservation and of the Indian country." State v. Moss, supra, 471 P.2d at 338, quoting State ex rel. Hollow Horn Bear v. Jameson, supra, 95 N.W.2d at 184-185.

The court concluded that the Act of March 3, 1905 had the effect of extinguishing Indian title and demonstrated an intent that the land should cease to be a part of the reservation and of "Indian country." This court also considered the effect of the Act of July 27, 1939, 53 Stat. 1128, describing this latter statute as one which:

> "• • • [I]nter alia, directed the Secretary of the Interior to establish land-use districts within the diminished and ceded portions of the Wind River Indian Reservation, to restore to tribal ownership all undisposed-of surplus or ceded lands within the land-use district not under lease or permit to non-Indians, and to restore the balance of said lands progressively as the non-Indian owned land within a given land-use district were acquired." State v. Moss, supra, 471 P.2d at 335.

The court was satisfied that the lands within the corporate limits of Riverton had not been included in any of

the restoration orders pursuant to that statute and simply observed that "• • • on its face it restored nothing but rather directed the Secretary of the Interior to restore in certain instances the ceded lands." State v. Moss, supra, 471 P.2d at 339.

In my view, the decisions of this court, premised on a finding that the ceded portion was disestablished, are supported by further investigation into the language of the treaty and the statutory history of the Wind River Indian Reservation. The language incorporated in the 1904 Agreement, which was approved by the Act of March 3, 1905, is substantially the same as that which Congress used to ratify and amend three agreements with the Indians of the Rosebud Reservation. Act of April 23, 1904, 33 Stat. 254; Act of March 2, 1907, 34 Stat. 1230; Act of May 30, 1910, 36 Stat. 448. Article I of the 1904 Agreement provided in pertinent part:

> "The said Indians belonging on the Shoshone or Wind River Reservation, Wyoming, for the consideration hereinafter named, *do hereby cede, grant, and relinquish to the United States, all right, title, and interest* which they may have had to all the lands embraced within the said reservation, except the lands within and bounded by the following described lines: • • •." (Emphasis added.)

Article II provided in pertinent part:

> "In consideration of the lands *ceded, granted, relinquished, and conveyed* by Article I of this agreement, the United States stipulates and agrees to dispose of the same as hereinafter provided under the provisions of the homestead, town-site, coal and mineral land laws, or by sale for cash as hereinafter provided at the following prices per acre: • • •." (Emphasis added.)

Examination of other aspects of the 1904 Agreement confirms that it was the intention of Congress to dis-

established the ceded portion as an Indian reservation and to leave a diminished reservation for the Shoshone and Arapahoe Tribes. In Article III, there is a provision for a sum of $85,000 from the sale of the lands to be used to make a per capita payment of $50 within sixty days of the opening of the ceded lands to settlement. Any remaining balance from this sum set aside for per capita payment was to be used to do those things necessary to secure water rights for any lands remaining the property of the Indians "* * * whether located within the territory to be ceded by this agreement or within the diminished reserve."[1] Perhaps "diminished" was not a word of art in Indian law in 1904. See Solem v. Bartlett, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443, reh. denied 466 U.S. 948, 104 S.Ct. 2148, 80 L.Ed.2d 535 (1984), cert. denied

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[1] An examination of the entire agreement, in light of prior events, discloses that any property outside the diminished reservation which remained under Indian ownership was limited to property which had been selected by individual Indians, under authority of the 1868 treaty and subsequent acts, and which was located on the portion to be ceded. It pertained to property which the individual Indian refused to exchange for a similar tract on the diminished reservation. Specific provision was made in Article I of the 1904 Agreement that: "* * * [A]ny individual Indian, a member of the Shoshone or Arapahoe tribes, who has, under existing laws or treaty stipulations, selected a tract of land within the portion of said reservation hereby ceded, shall be entitled to have the same allotted and confirmed to him or her, and any Indian who has made or received an allotment of land within the ceded territory shall have the right to surrender such allotment and select other lands within the diminished reserve in lieu thereof at any time before the lands hereby ceded shall be open for entry." The legislative history demonstrates that the policy of the United States of America was to request all Indians to take allotments within the diminished reservation. It was believed that with the exception of 29 allottees, the Indian peoples would surrender their allotments on the lands which they had obtained under the 1868 treaty of Fort Bridger and "* * * select other lands within the diminished reservation, where there is an abundance of good land for the purpose, and which can be more readily and inexpensively irrigated." H.R. Rep. No. 3700, 50th Cong., 3d Sess., pt. 1, at 19 (1905).

—— U.S. ——, 107 S.Ct. 409, 93 L.Ed.2d 361 (1986). In the context in which it was used in the 1904 Agreement, however, it could indicate only the intent to diminish the boundaries of the then-existing reservation. See Oregon Department of Fish and Wildlife v. Klamath Indian Tribe, 473 U.S. ——, ——, 105 S.Ct. 3420, 3425 n.11, 87 L.Ed.2d 542 (1985) (indicating express use of the term "diminished reservation" is some indication of congressional intent).

Two other articles in the 1904 Agreement manifest an intent that funds be expended for development of the reservation but only within the diminished reservation. Article IV provided for $150,000 to be expended on an irrigation system "within the diminished reservation." Article VI provided for $50,000 to be expended for "the erection of school buildings and maintenance of schools on the diminished reservation." Further, Article IX of the 1904 Agreement was amended by the Act of March 3, 1905 to include an appropriation of $35,000 for the "survey and field and office examination of the unsurveyed portions of the ceded lands, and the survey and marking of the outboundaries of the diminished reservation, where the same is not a natural water boundary; * * *." This provision manifests an intent to set apart the diminished reservation by establishing boundaries between the diminished and ceded portions. Taken together, the language of the 1904 Agreement expresses a congressional intent to disestablish the ceded portion from the then-existing reservation with the result being a diminished Wind River Indian Reservation.

The amplification of the statutory history demonstrates that Congress intended to disestablish the ceded portion of the reservation, consistent with the prior holdings of this court. The Wind River Indian Reservation was established by Congress as a Shoshone Reservation on July 3, 1868, upon the execution of the Second Treaty of Fort Bridger with the Shoshone and Bannock Indians. In 1878,

the Arapahoe Indians were quartered on the reservation, and it subsequently became a joint reservation for the Shoshone and Arapahoe Tribes. Congressional efforts to reduce the size of the reservation culminated, on October 2, 1891, in an agreement which was reached with the Shoshone and Arapahoe Indians of the Wind River Reservation for the cession of approximately 1,100,000 acres for a consideration of $600,000. H.R. Exec. Doc. No. 70, 52d Cong., 1st Sess., at 23 (1892). The chairman of the commission which had been appointed to negotiate the agreement refused to execute it, however, with his principal reason being that it left the Indians with too much land.

> "The Indians are left as now with too much land. The same complaints which their superabundance of land now gives rise to must necessarily continue. They surrender what is comparatively a small portion of their reservation, considering its value, and a portion from which but little of their former troubles have arisen. The part surrendered is comparatively worthless, and they propose to receive for it what, in the best possible light, is an exorbitant price." H.R. Exec. Doc. No. 70, supra, at 21.

Congress followed the recommendations of the chairman and did not ratify the 1891 Agreement. Instead, Congress authorized the reopening of negotiations for the cession of a larger portion of the reservation. Act of July 13, 1892, 27 Stat. 120.

In January, 1893, a new commission was sent to negotiate but with orders to reduce the Wind River Indian Reservation to 300,000 acres. That commission determined, however, that 650,000 acres were needed for purposes of the reservation. H.R. Exec. Doc. No. 51, 53d Cong., 2d Sess., at 13 (1894). In the course of these negotiations, the representatives of the Indian peoples manifested a desire to sell a large portion of the reservation, which they felt white ranchers were using without pay-

ment or permission, but they refused to sell any portion of the reservation south of the Wind River. Chief Washakie of the Shoshone Tribe expressed their position:

> "I guess we will not trade, I tell you now that I will not sell this land on the south side, I am done talking about it." H.R. Exec. Doc. No. 51, supra, at 18.

There is no record of any further negotiations of significance until April 21, 1896, when Inspector James McLaughlin successfully negotiated an agreement to cede 55,040 acres for $60,000, including some hot springs (Thermopolis) which the government desired to open for public use. That agreement was approved by Congress on June 7, 1897. S. Doc. No. 247, 54th Cong., 1st Sess. (1896); H.R. Doc. No. 5, 55th Cong., 2d Sess., at 34-36, 406-408 (1897). Although not related directly to subsequent negotiations, this agreement did set the stage for negotiations that later led to the passage of the Act of March 3, 1905. See J. McLaughlin, *My Friend the Indian*, ch. XXVII (1910); L. Pfaller, *James McLaughlin, The Man with an Indian Heart*, ch. XIII (1978).

On March 4, 1904, Representative Mondell of Wyoming introduced H.R. 13481 entitled "A Bill to ratify and amend an agreement with the Indians residing on the Shoshone or Wind River Indian Reservation, in the State of Wyoming, and to make appropriations for carrying the same into effect." 38 Cong. Rec. at 2843 (1904), printed in entirety in 38 Cong. Rec. at 5245-5247 (1904). Among the purposes of this bill was ratification of the 1891 Agreement, but it, in fact, included substantial amendments to that agreement, providing, among other things, for a larger cession of land and a change in the manner of payment from a sum certain to proceeds from the sale of the land. H.R. Rep. No. 2355, 58th Cong., 2d Sess. (1904). The purpose of the bill was exactly the same as that of the agreement; to reduce the size of the Wind River Indian Reservation to an area

better suited to the needs of the Indians and the United States. The Committee on Indian Affairs commented on H.R. 13481:

> "H.R. No. —— proposes to reduce the reservations, as suggested by Mr. Woodruff at the time of the making of the Agreement of 1891, and in this connection it should be remembered that the instructions to the commission in 1891 were to reduce the reservation from 650,000 to 700,000 acres. The bill in question still leaves the Indians with 808,500 acres. A careful estimate by the General Land Office gives the area of the lands proposed to be ceded by the above bill at 1,480,000 acres, leaving 808,500 acres in the diminished reserve. There are 1,650 Indians on the reservation at this time, so that the diminished reserve leaves about 500 acres per Indian man, woman, and child, on the reservation.
>
> "The diminished reserve is by all means the best portion of it, although there are some good lands in the ceded tract. The diminished reserve is, however, a particularly well-watered, well-grassed country, a considerable portion of which is susceptible of irrigation, several thousand acres being now under irrigation and farmed by the Indians." H.R. Rep. No. 2355, supra, at 3.

The Committee on Indian Affairs favored Mondell's bill but suggested an amendment requiring the consent of the Indian peoples. H.R. Rep. No. 2355, supra at 2. James McLaughlin, the United States Indian Inspector who had negotiated successfully the Rosebud and Devil's Lake Agreements and the 1896 Agreement with the Indians of the Wind River Reservation, was chosen to seek the consent of the Shoshone and Araphoe Tribes to the amendment. McLaughlin arrived at the Wind River Indian Reservation on April 15, 1904, and, six days later, he reached an agreement which he described in this way:

> "* * * [A]long the lines of the 'Mondell Bill' as to boundaries and manner of payment, but with some modifications of certain of its provisions, which, as I regard it, is in the interests of the Government and, at the same time, more beneficial and pleasing to the Indians." Letters of James McLaughlin (Microfilm Roll 26 at 12).

It is reflected in the minutes of the council meeting at which this agreement was discussed that both Inspector McLaughlin and the representatives of the Indian peoples understood that Congress intended the sale of a large portion of the Wind River Indian Reservation, for which compensation was to be made in accordance with the Mondell Bill.

> "* * * The President and the Secretary of the Interior are desirous to have you sell your surplus lands and open them to settlement as much so as Congress, but at the same time, they are desirous to see that the Indians have full compensation for such lands ceded to the government. For several years past there has been a sentiment in Congress, and one that is growing stronger each succeeding year, opposed to paying the Indians a lump sum consideration for their lands. Instead of stipulating, or providing in the agreement, a lump sum consideration for any tract of land, they have determined upon giving the Indians the full benefit of the land by paying the Indians from the proceeds of the sale of the land as white men settle upon it. Several agreements with tribes of Indians that provided for a lump sum consideration which were presented to Congress the past two years have not been ratified, for the reason that Congress has refused to act upon any such agreements, and the said agreements have had to be changed before they could be carried out. I have made this explanation that you may know my reasons for not being able to entertain a prop-

osition from you people for a lump sum consideration. Understand that anything you may receive from these lands will be paid to you from the proceeds of sales of same to white men.

* * * * *

"In days gone by, years ago, when your reservation was set apart, large reservations were possible, because the white man did not desire the lands, but the tide of immigration is now pressing from both east and west, white men are clamoring for additional lands, and all lands that the Indians have no need of, must be opened for settlement, the department having charge of the Indians cannot prevent it, and can only secure them by giving them homes and allotments in severalty, and that is why I am here today, to present to you an agreement for disposing of the lands that you do not need.

"For the purpose of having the surplus lands of your reservation open to settlement and realizing money from the sale of that land, which will provide you with means to make yourselves comfortable upon your reservation, a bill has been introduced in Congress called the 'Mondell Bill.' which I will read. It has been presented and reported favorable from the Committee on Indian Affairs of the House, and is now awaiting action on the part of you people before it is taken up in the Senate." (Thereafter the Mondell Bill was read to the Indians by Inspector McLaughlin.) McLaughlin Letters (Microfilm Roll 26 at 26-27).

There can be no question that the representatives of the Indian peoples understood that the agreement and the bill contemplated an outright sale of a large portion of the Wind River Indian Reservation. Among the remarks of the participants were:

LONE BEAR,
ARAPAHOE:

> "I understand what he comes for, and I will let him know what I think of it, and I will tell what part of the Reservation I want to sell."

REVEREND SHERMAN
COOLIDGE, ARAPAHOE:

> "I am glad that Major McLaughlin has come to us to purchase a portion of our reservation. The proposed ceded portion has not been used by us except for grazing purposes, and I think cash money will be of more value among the Arapahoes and Shoshones. I am in favor of the 'Mondell Bill' along the lines, with slight changes that we discussed with the Shoshones last night."

GEORGE TERRY,
SHOSHONE:

> "It is not like selling a wagon, a horse, or something of that nature, but it is something we are parting with forever, and can never recover again."
>
> McLaughlin Letters (Microfilm Roll 26 at 32, 35 and 40.)

Clearly, the Indian representatives understood the Mondell Bill. They suggested changes in certain provisions relating to the expenditure of the moneys to be received from the sale of the lands and requested a resurvey of the western boundary of the diminished portion of the reservation to make it conform with the 1868 treaty. They also requested a provision that the agreement require the signatures of a majority of male Indians over eighteen from both tribes. Inspector McLaughlin reported on his negotiations with the Indian peoples in this way:

"The diminished reservation leaves the Indians the most desirable and valuable portion of the Wind River Reservation and the garden spot of that section of the country. It is bounded on the north by the Big Wind River, on the east and southeast by the Big Popo-Agie River, which, being never failing streams carrying a considerable volume of water, give natural boundaries with well-defined lines; and the diminished reservation, approximately 808,000 acres, about three-fourths of which is irrigable land, allows 490 acres each for the 1,650 Indians now belonging on the reservation. I gave this question a great deal of thought and considered every phase of it very carefully and became convinced that the reservation boundary, as stipulated in the agreement, was ample for the needs of the Indians belonging thereto; that by including any portion of the lands north of the Big Wind River or east of the Big Popo-Agie River in the diminished reservation it would only be a short time until the whites would be clamoring to have it open to settlement, and the Indians would be eventually compelled to give it up. Furthermore, with the exception of about 20 families (mixed bloods and white men who are intermarried into the tribes) there are no Indians occupying lands outside of the diminished reservation." Letter of James McLaughlin, United States Indian Inspector, to the Secretary of Interior, April 25, 1904, printed in full in H.R. Rep. No. 3700, 58th Cong., 3d Sess., supra, pt. 1, at 15-19.

The Mondell Bill, H.R. 13481, resembled the proceding 1891 Agreement in that it proposed to disestablish the ceded portion of the then-existing Wind River Indian Reservation resulting in a diminished reservation to be inhabited by the Shoshone and Arapahoe Indians. That particular bill, however, was not adopted by Congress. Changes to the bill which had been suggested by the In-

dian peoples and accepted by Congress, along with further amendments to the bill such as the Asmus Boysen provision [2] made it necessary that a new bill "be passed in lieu of H.R. 13481." The new bill was H.R. 17994. See H.R. Rep. No. 3700, supra, pt. 1, at 1-3. This is the bill which, after extensive debate in both houses and the adoption of a committee resolution relating to a disagreement between the House of Representatives and the Senate, ultimately passed as the Act of March 3, 1905. The intent of H.R. 17994 was consistent with and very much the same as that of H.R. 13481 and the 1891 Agreement.[3]

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[2] This amendment was to Art. II of the 1904 Agreement to include a provision providing that one Asmus Boysen have a preferential choice of 640 acres in the ceded portion in exchange for any interest he had under a pre-existing mineral lease with the Shoshone and Araphoe Indians on certain lands of the ceded portion. There was a dispute over this amendment because some members of the Indian Affairs Committee felt that Boysen's interest would terminate automatically with the passage of the Act. Section 13 of Boysen's lease did provide:

> "'In the event of the extinguishment, with the consent of the Indians, of the Indian title to the lands covered by the lease, then and thereupon this lease and all rights thereunder shall terminate.'" Quoted in H.R. Rep. No. 3700, 50th Cong., 3d Sess., pt. 2, at 3 (1905).

The minority report contended that, because of the granting language of the agreement, Indian title would be extinguished, and Boysen's interest thereupon would disappear. Representative Lacey of Iowa had proposed the amendment to protect any interests that one of his constituents might have in Boysen's lease. Representative Lacey argued that the provision was necessary because under the Mondell Bill the Indian title would not be lost until five years after entry by settlers. He argued that the trust would be burdened if the lease were not canceled in accordance with the amendment. Ultimately, the House and the Senate concurred in this amendment.

[3] The majority correctly perceive the 1896 Agreement, relating to the Thermopolis hot springs, as having divested the Indian peoples of any interest in the water rights to the portion of Wind River Indian Reservation ceded by that agreement. It is not clear why, having reached that conclusion, the 1891 Agreement, as approved by the Act of March 3, 1905, should lead to a different conclusion.

[Continued]

From the initial negotiation in 1891 to passage of the Act of March 3, 1905, the history of the 1904 Agreement and the legislation demonstrate that Congress intended the cession of a large portion of the then-existing Wind River Indian Reservation by disestablishing the ceded portion and recognizing a diminished reservation. The provisions of the Act of March 3, 1905, H.R. 17994, were considered most carefully by Congress. Congressman Mondell had continued with his efforts to have H.R. 13481 passed through both houses while James McLaughlin remained in Wyoming. Congressman Mondell had offered amendments to conform to suggestions by the Committee on Indian Affairs, and as amended, the House had passed the bill. 38 Cong. Rec., supra, at 5247-5248. The bill then had been read in the Senate and referred to the Senate Committee on Indian Affairs. 38 Cong. Rec.,

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[3] [Continued]

The legislative history furnishes no hint that Congress might have perceived it was obtaining any lesser interest in the land under the 1904 Agreement than that which would have been obtained under the 1891 Agreement. The extensive debate on several provisions of the Act of March 3, 1905, coupled with the lack of any reference to the admission of an expressed cession of water rights under the Mondell Bill, indicates Congress did not perceive the provision as important. The reference to appertaining water rights, in the 1896 Agreement, should not be afforded any greater significance than that included in the October 2, 1891 Agreement, which also referred to appertaining water rights. The 1896 Agreement contained very similar language to the 1891 Agreement, and the 1891 Agreement substantially was implemented by the Act of March 3, 1905, which had very similar language to that included in the Rosebud Agreement. The Rosebud Agreement was debated extensively and passed by the House just prior to Representative Mondell's introduction of H.R. 13481, a bill "to ratify and amend an agreement with the Indians residing on the Shoshone or Wind River Indian Reservation * * *." See 38 Cong. Rec., at 1423, 1643, 1899 and 2843 (1904). Certainly, a sale for a sum certain, provided for in the 1891 and 1896 Agreements but not provided for in H.R. 13481 or H.R. 17994, could not be controlling. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977).

supra, at 5294. The Senate Committee had recommended passage with additional amendments. 38 Cong. Rec., supra, at 5671; S. Rep. No. 2621, 50th Cong., 2d Sess. (1904), and the bill had been passed with amendments by the Senate on April 27, 1904. 38 Cong. Rec., supra, at 5707. The House was unable to accede to the Senate amendments before that session of Congress adjourned.

When H.R. 17994 was offered in the third session by Representative Marshall, in lieu of H.R. 13481, its purpose was to amend and ratify the April 21, 1904 Agreement with the Indian peoples residing on the Shoshone or Wind River Indian Reservation in the State of Wyomin. 39 Cong. Rec., at 1112 (1905). This new bill was sent to the House Committee on Indian Affairs, which split over the Asmus Boysen Amendment, but which also proposed the following amendment:

> "*Provided*, that the constitution and laws of the State of Wyoming shall not operate to secure any rights, having priority to those members of the Shoshone tribe of Indians, to the use of the waters within the territory hereby open to sale and settlement, including Big Wind River and its tributaries, for purposes of irrigation of the lands comprised within such territory, until such time as the United States shall have perfected allotments to the members of the Shoshone Indian tribe, either from the lands to be opened for settlement or within the diminished reservation of said Indians, and completed the necessary steps under the law to secure the desired water rights for the said allotments." H.R. Rep. No. 3700, supra, pt. 1 at 7.

When the bill was returned to the House, it was passed after coniderable debate and some difficulty, and with the Boysen Amendment removed. The bill then went to the Senate and was referred to the Senate Committee on Indian Affairs. That committee reported back with the recommendation of passage with amendments. One of

those was to reinsert a modified provision for the Boysen Amendment previously struck in the House. Yet another amendment removed the House amendment quoted above relating to the inhibition on settlers with respect to obtaining perfected water rights under Wyoming law before the Indians' water rights could be perfected. The bill passed the Senate with these amendments and was sent back to the House. After a motion was passed to disagree with the Senate amendments, a conference committee was appointed. The recommendation of the conference committe was that the House should recede from disagreeing with the Senate amendments and after further debate the conference report was passed by the House. 39 Cong. Rec., supra, at 3886-3887. The bill then was sent in its final form to the president and enacted as the Act of March 3, 1905. 39 Cong. Rec., supra, at 3974, 4033.

Representative Marshall spoke on the floor of the House:

> "Mr. Speaker, the gentleman from Wyoming [Mr. Mondell] has well said that this bill has had more careful consideration than any bill of this character that has been before the Indian Committee, and there is but one possible objection to it, and that is the objection to giving this preferential right to 640 acres to Mr. Boysen. I was chairman of the subcommittee that considered that question, and we considered it long and carefully and conscientiously, and ultimately decided that, as a matter of equity, Mr. Boysen was entitled to this preferential right." 39 Cong. Rec., supra, at 1945.

It is of particular moment to note that an amendment to inhibit the operation of the constitution and laws of the State of Wyoming so as to secure any rights to the use of waters within the ceded territory was defeated.

The legislative history subsequent to the passage of the Act of March 3, 1905 demonstrates an understanding

that the ceded portion of the Wind River Indian Reservation had been disestablished. A discussion on appropriations for the construction of an irrigation project on the Shoshone or Wind River Indian Reservation can be found in hearings before the House Committee on Indian Affairs relating to H.R. 12579. Indian Appropriation Bill, Hearings on H.R. 12579, Before the Senate Committee on Indian Affairs, 63d Cong., 2d Sess., at 279-281 (1914). In those hearings, Mr. Merritt offered the following clause to be attached as a provision to a $25,000 appropriation:

> "*Provided*, That the use of so much water as may be necessary to supply for domestic, stock watering, and irrigation purposes, land allotted or to be allotted to Indians on the diminished Shoshone or Wind River Reservation, in Wyoming, or set aside for administrative purposes within said reservation is hereby reserved, and the failure of any individual Indian or Indians to make beneficial use of such water shall not operate in any manner to defeat his or her right thereto while said land is held in trust by the United States. All laws and parts of laws in conflict herewith are hereby repealed."

Mr. Merritt then read from a memorandum which stated:

> " 'The purpose of this and other similar legislation in this bill is to protect the rights of Indians to water on Indian reservations and on allotted Indian lands held under trust or by other patents containing restrictions on alienation.
>
> " 'To establish more certainly and securely water rights of Indians is a matter of the greatest importance in administering satisfactorily their affairs. On a number of reservations where Indians have been allotted, the land is practically of no value for agricultural purposes without irrigation. Water on these reservations is a vital factor in developing the

Indians living thereon so that they become self-supporting and be raised to a higher standard of civilization.

" 'The Supreme Court in the case of Winters v. United States (207 U.S., 564), said that "The power of the government to reserve waters and exempt them from appropriation under the State laws is not denied, and could not be."

" 'The Supreme Court further said in this case that there was an implied reservation for the benefit of the Indians of a sufficient amount of water from the Milk River for irrigation purposes which was not affected by the subsequent act of February 22, 1889 (25 Stat. L., 676), admitting Montana to the Union, and that the water of the Milk River cannot be diverted so as to prejudice the rights of the Indians by settlers on the public lands and those claiming riparian rights on that river.

" 'It is believed that the general principles laid down in the Winters case are applicable to all Indian reservations where there are no specific acts of Congress to the contrary. However, I find that the very favorable decision of the Supreme Court in the Winters case regarding the water rights of Indians has been practically nullified by various acts of Congress, and as a result of such legislation the water rights of Indians are now dependent on beneficial use in a number of reservations where the Government has been, and is now, spending large amounts of reimbursable funds, and by acts of Congress those water rights are subject to the laws of several of the States wherein these irrigation projects are located.' " Memorandum referred by Mr. Merritt, reported in Indian Appropriation Bill, Hearings on H.R. 12579, supra, at 280.

This statement of purpose is consistent with a policy, implemented following the passage of the Act of March

8, 1905, to encourage all of the Indians of the Wind River Reservation to reside only on the diminished portion. The annual report of the Secretary of Interior for 1906 included this comment:

> "W.B. Hill, superintendent of irrigation, has been instructed to make surveys of ditches in use and of those necessary to be constructed on the Shoshone Reservation so as to give water to each allottee if possible and in order to apply for permit to appropriate waters under the laws of Wyoming. He was advised that in the beginning only such construction should be made as might be necessary to maintain priority of water rights and that any system of irrigation planned should be within the diminished reservation. In revising and completing allotments to the Indians on that reservation it is the policy of the Office to make new allotments within the diminished reservation, and to encourage Indians who have received allotments north of Big Wind River to relinquish them and agree to take other lands in lieu thereof within their diminished reservation." H.R. Doc. No. 5, 59th Cong., 1st Sess., at 155 (1905). Also see Letter to Walter B. Hill from Department of Interior, August 11, 1904, Act of August 1, 1914 (38 Stat. 582 § 24) (1914).

It is noteworthy that construction for an irrigation project was restricted to the diminished reservation; Congress was concerned with protecting the water rights of Indians on reservations and certain Indian allotments not within reservation boundaries; it was understood that despite Winters v. United States, supra, federal action might be necessary to protect Indian reservation water rights; and there was a complete absence of any concern for protecting any water rights appurtenant to the ceded lands, other than lands owned by Indian allottees. All this strongly indicates an understanding of Congress that a sufficient interest in the ceded land had

not been retained by the Indians so that any reserved water rights appurtenant to the ceded portion were retained. See also Act of August 1, 1914 (38 Stat. 582, § 24, supra) (enacting H.R. 12579, as amended, and providing funds for construction of the irrigation system, roads and bridges within the diminished reservation manifesting an intent for the Indian peoples to corporately reside within the boundaries of the diminished reservation).

The intent to disestablish the ceded portion also is supported by the treatment in the 1904 Agreement of Sections 16 and 36 in those surveyed townships within the ceded portion of the reservation. An amendment to that agreement deleted a provision in Article II for the purchase of lands in lieu of Sections 16 and 36 of the ceded portion by the United States for $1.25 per acre. The deletion of this provision was accomplished by an amendment of Representative Mondell who explained that it was believed to leave Wyoming "authorized under the enabling act to take lieu land." 38 Cong. Rec., supra, at 5247. The effect of this amendment is to demonstrate further the understanding of Congress that passage of the Act of March 3, 1905 not only would disestablish the ceded portion but also would extinguish Indian title to the ceded portion. The Wyoming Act of Admission provided that Sections 16 and 36 in every township in Wyoming were granted to the State for the support of common schools and provided that the State could select equivalent lands if Sections 16 and 36 had been sold or otherwise disposed of by the authority of any act of Congress. Act of July 10, 1890, 26 Stat. 222, § 4. The obvious concern of this amendment by Representative Mondell was that the Act of March 3, 1905 had the effect of removing the ceded portion from the disclaimer in Article 21, Section 26 of the Constitution of the State of Wyoming, disavowing any claim of a state interest in lands reserved for the Indians. Further, there was a concern that such provisions for school lands extended

only to public federal lands. See Minnesota v. Hitchcock, 185 U.S. 373, 22 S.Ct. 650, 46 L.Ed. 954 (1902); Rosebud Sioux Tribe v. Kneip, supra, 430 U.S. at 601 n.23, 97 S.Ct. at 1370 n.23. If the effect of the act of March 3, 1905 was to restore the ceded lands to the status of public federal lands and to avoid the inhibition of the Wyoming Constitution, then Wyoming could claim Sections 16 and 36 in townships on the ceded portion of the reservation. Since apparently no payment would be required by the United States for Sections 16 and 36, the amendment removed the requirement to pay for lieu lands selected because of the disposal of Sections 16 and 36. This proviso was different from that involved in Rosebud Sioux Tribe v. Kneip, supra, in which the United States had been required to purchase Sections 16 and 36 for the benefit of South Dakota. Unless the ceded portion was disestablished as a reservation, however, the amendment to delete the requirement to pay for lieu lands had no significance.

A parallel history with respect to the Wind River Indian Reservation developed in the executive branch of the federal government. The presidential proclamation of June 2, 1906 states:

> "WHEREAS, By an agreement between the Shoshone and Arapahoe tribes of Indians, belonging to the Shoshone or Wind River reservation in the State of Wyoming, on the one part, and James McLaughlin, a United States Indian Inspector, on the other part, amended and ratified by act of Congress approved March third, nineteen hundred and five (33 Stat., 1016), the said Indian tribes ceded, granted, and relinquished to the United States all the right, title, and interest which they may have had to all of the unallotted lands embraced within said reservation, except the lands within and bounded by the following described lines:
>
> * * * * *

> "NOW, THEREFORE, I, THEODORE ROOSEVELT, President of the United States of America, by virtue of the power in me vested by the said Act and Resolution of Congress, do hereby declare and make known that all the unallotted lands in the ceded portion of said reservation, except such as may at that time have been reserved for carrying out the provisions of said amended treaty relative to the rights of Asmus Boysen, allowing him to locate in accordance with the Government surveys not to exceed 640 acres in the form of a square, of mineral or coal lands in said reservation, and to purchase the same, will, on and after the fifteenth day of August, nineteen hundred and six, in the manner hereinafter prescribed, and not otherwise, be open to settlement, entry, and disposition under the general provisions of the homestead, townsite, coal, and mineral land laws of the United States." 34 Stat., pt. 3, at 3208.

The language found in that proclamation expresses "an unambiguous, contemporaneous, statement, by the Nation's Chief Executive, of a perceived disestablishment" of the ceded portion of the Wind River Indian Reservation. See Rosebud Sioux Tribe v. Kneip, supra, 430 U.S. at 602-603, 97 S.Ct. at 1371.

After passage of the Act of March 3, 1905, the Department of the Interior of the United States published maps of the Wind River Indian Reservation which reflect an understanding of the executive department that the Indian peoples had not retained a sufficient interest in the ceded portion of those lands to cause the Department of Interior to consider it an Indian reservation. The Department of the Interior's map of the State of Wyoming for 1892 shows the Wind River or Shoshone Indian Reservation boundaries to exist as stated by treaties prior to the 1896 Agreement. The Department of the Interior's map for 1900 shows the reservation slightly reduced by the cession under the 1896 Agreement. Sim-

ilarly, the Department of the Interior's maps for 1907 and 1912 reflect a dramatic decrease in the boundaries of the Wind River or Shoshone Indian Reservation, excluding the ceded land from that area known as the Wind River or Shoshone Indian Reservation. Dinsmore, A.F., compiler, *State of Wyoming*, United States Department of the Interior, General Land Office, 1892, scale 1:12, 1 sheet; King, H., compiler, *Map of the State of Wyoming*, United States Department of the Interior, General Land Office, 1900, scale 1:12, 1 sheet; Berthrong, I.P., compiler, *State of Wyoming*, United States Department of the Interior, General Land Office, 1907, scale 1:12, 1 sheet; Berthrong, I.P., compiler, *State of Wyoming*, United States Department of the Interior, General Land Office, 1912, scale 1:12, 1 sheet.

This legislative and executive history subsequent to the passage of the Act of March 3, 1905 supports only one conclusion: a status of an Indian reservation was intended and understood only for the diminished reservation; the Indians corporately would reside on the diminished reservation, and any of those who continued to live on the ceded portion would do so only as private allottees.

Finally, an understanding by the United States that the ceded portion was disestablished from the reservation is demonstrated by acquiescence in the decisions of this court upholding state jurisdiction over the ceded portion. The effect of this unquestioned and consistent exercise of jurisdiction by the State of Wyoming over certain lands within the ceded portion is well expressed in Rosebud Sioux Tribe v. Kneip, supra, 430 U.S. at 604, 97 S.Ct. at 1372, 51 L.Ed.2d 660 (1977), in which the court said:

> "• • • [T]he fact that neither Congress nor the Department of Indian Affairs has sought to exercise its authority over this area, or to challenge the State's exercise of authority is a factor entitled to weight as a part of the 'jurisdictional history'."

The cases decided by this court and the very intriguing legislative and executive department history all are compatible with federal precedent relating to the disestablishment of an Indian reservation. Disestablishment abrogates appurtenant rights. Implied water rights on Indian reservations, founded upon the reserved rights doctrine, are extinguished by acts of Congress inconsistent with recognition of their existence, even though they are not subject to state law concerning the abandonment or extinguishment of a water right. See United States v. Anderson, 591 F.Supp. 1 (E.D.Wash. 1982). There appears to be no question that Congress may limit or extinguish Indian title,[4] and any rights appurtenant to the title, without obtaining the consent of the Indian peoples. Solem v. Bartlett, supra; Rosebud Sioux Tribe v. Kneip, supra; Lone Wolf v. Hitchcock, 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed.2d 299 (1903); Ute Indian Tribe v. State of Utah, 716 F.2d 1298 (10th Cir. 1983), cert. denied —— U.S. ——, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986).

The cases hold that when Congress extinguishes the title of Indian peoples to a portion of any land, any hunting and fishing rights appurtenant to the land, to the extent that recognition of such right is inconsistent with extinguishment of the title, is limited impliedly or extinguished also. Oregon Department of Fish and Wild-

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[4] Applying a strict concept of title, fee title to Indian lands has been vested in the United States of America under the doctrine of discovery, with the Indian peoples retaining a right to possess and occupy that land. Their right of occupancy is good against all except the sovereign, who may terminate the right at will, although perhaps just compensation must be provided prior to termination. See Oneida Indian Nation of New York State v. Oneida County, New York, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974); Shoshone Tribe of Indians v. United States, 299 U.S. 476, 57 S.Ct. 244, 81 L.Ed. 360 (1937). See generally F. Cohen, Handbook of Federal Indian Law, at 486-493 (1982); P. Maxfield, M. Dieterich & F. Trelease, Natural Resources Law on American Indian Lands, at 17-19 (1977).

life v. Klamath Indian Tribe, supra; Puyallup Tribe, Inc. v. Department of Game of State of Washington, 391 U.S. 392, 88 S.Ct. 1725, 20 L.Ed.2d 689, reh. denied 393 U.S. 898, 89 S.Ct. 64, 21 L.Ed.2d 185 (1968); Ward v. Race Horse, 163 U.S. 504, 16 S.Ct. 1076, 41 L.Ed. 244 (1896). Cf. Menominee Tribe of Indians v. United States, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968). In several cases, the Supreme Court of the United States has said that water rights implied because of the reserved rights doctrine are appurtenant to the federal lands actually set aside by Congress. See United States v. New Mexico, 438 U.S. 696, 698, 98 S.Ct. 3012, 3013, 57 L.Ed.2d 1052 (1978) (defining a federally implied reserved water right as one reserved for future use "on appurtenant lands withdrawn from the public domain for specific federal purposes"). See also Arizona v. California, supra; Cappaert v. United States, 426 U.S. 128, 99 S.Ct. 2062, 48 L.Ed.2d 523 (1976); Winters v. United States, supra.

The implied water right which is reserved is limited to that amount of water necessary to fulfill the purposes for which the land itself was reserved. Cappaert v. United States, supra. It should not matter what purpose the appurtenant rights were intended to accomplish, and the extinguishment of appurtenant water rights by implication should be as inevitable as the extinguishment of appurtenant hunting and fishing rights by implication. Once the Congress determines that the land previously set aside for some federal purpose no longer is required for that purpose, any appurtenant water rights reserved by implication no longer are necessary to accomplish the purpose initially intended. The issue to be resolved is whether the congressional action demonstrates that the land no longer is required for the purpose for which it originally was reserved. The appropriate inquiry then is whether congressional action manifests an intent that land previously set aside for the purpose of the Shoshone

or Wind River Indian Reservation no longer was required to accomplish the purpose of an Indian homeland.

The Supreme Court of the United States in several cases has recognized the relevant considerations to be pursued in determining whether Congress intended to disestablish a portion of the land from an existing reservation. See e.g., Solem v. Bartlett, supra; Rosebud Sioux Tribe v. Kneip, supra; Ute Indian Tribe v. State of Utah, supra.

> "* * * The underlying premise is that congressional intent will control. In determining this intent, we are cautioned to follow 'the general rule that "[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." ' The mere fact that a reservation has been open to settlement does not necessarily mean that the opened area has lost its reservation status. But the 'general rule' does not command a determination that reservation status survives in the face of congressionally manifested intent to the contrary. In all cases, 'the face of the Act.' the 'surrounding circumstances,' and the 'legislative history,' are to be examined with an eye toward determining what congressional intent was." (Citations omitted.) Rosebud Sioux Tribe v. Kneip, supra, 430 U.S. at 586-587, 97 S.Ct. at 1365.[6]

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[6] The Indian peoples who participated in the negotiation with respect to the 1904 Agreement do not appear to have been weak and defenseless as suggested in the quoted language. James McLaughlin described George Terry as a mixed blood spokesman for the Shoshone Indians "* * * whose gift of language and acquirements made him a man to be regarded with some respect." James McLaughlin, *My Friend the Indian*, at 296 (1910). George Terry spoke at the counsel meeting in April, 1904 and explained the Indian peoples' understanding of the 1904 Agreement.

> "Major McLaughlin, our worthy agent, Ladies and Gentlemen: This is no little bargain we are entering into. It is not like

In Rosebud Sioux Tribe v. Kneip, supra, the Supreme Court construed treaty language substantially similar to the language in the 1904 Agreement relating to the Wind River Indian Reservation. The Supreme Court said that such language is " 'precisely suited' " to demonstrate an intent to disestablish a ceded portion of land from a reservation and creates "an unmistakable baseline purpose of

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selling a wagon, horse, or something of that nature, but it is something we are parting with forever, and can never recover again. These lands that we are about to dispose of have been our lands for ages. They have been our lands by inheritance for many, many years before the white man came this way. These same lands have been our lands by conquest. Our fathers fought with every nation that came near them and came off victorious, and from that date to this, they held this land as their own. These lands are our lands by treaty stipulations. We have given up vast tracts for this little tract of land called the Wind River Reservation. Now, we are glad our Arapahoe friends came in, and we will join hands with them and endeavor to pass a measure here that will follow the lines of this 'Mondell bil.' " Minutes of Council Meeting at the Wind River Reservation, April, 1904, Letters of Inspector James McLaughlin, Microfilm Roll 26 at 40.

Concluding his remarks, Terry said:

> "Now, Major, We all thank you very much for the feast, but we want it understood, that we do not give our consent to your agreement because you have filled us with beef, bacon, sugar, flour and coffee. It has gone upon record that all the white man has to do, to get the consent of the Indian to anything he desires, is to fill him up with what he likes. I want it to go on record, that notwithstanding the fact that we have been feasted, we have considered this bill in a sober and thoughtful manner, and for the benefit of every man, woman, and child on the reservation." Minutes of Council Meeting at the Wind River Reservation, April, 1904, Letters of McLaughlin, supra, Microfilm Roll 26 at 43.

Of course, the understanding of the Indian peoples is relevant only to the extent that it explains Congressional intent because the actions of Congress in diminishing an Indian reservation do not depend on consent of the Indians. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977); Lone Wolf v. Hitchcock, 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed.2d 299 (1903).

disestablishment." Rosebud Sioux Tribe v. Kneip, supra, 430 U.S. at 592, 597, 97 S.Ct. at 1366, 1368, quoting DeCoteau v. District County Court, 420 U.S. 425, 445, 95 S.Ct. 1082, 1093, 43 L.Ed.2d 300 (1975). It appears that the face of the act approving the 1904 Agreement demonstrates an intent to disestablish the ceded portion. That intent is substantiated by an examination of the legislative history.[6]

The decisions of this court not only are consistent with the legislative history relating to the Wind River Indian Reservation but also are consistent with the conclusions of the Supreme Court of the United States in similar instances. "The face of the act," the "surrounding circumstances," and the "legislative history" all serve to manifest a congressional intent to disestablish the ceded portion of the Wind River Indian Reservation. It follows that the ceded portion has not been an Indian reservation, intended to supply an Indian homeland for the Shoshone and Arapahoe tribes since 1905. Under those circumstances, there is no justification for invoking the reserved rights doctrine with respect to those areas identified as practicably irrigable acreage on the ceded portion and including them in the quantification of water set aside for the Indian peoples. I would eliminate those lands from the formula in their entirety.

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[6] The dissenting opinion in Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977), notes that the manner of payment was not approved by the required majority of the Indians. This resulted in concerns by the dissenting justices as to compliance with the legal meaning of the word "cede." In the case of the 1904 Agreement as to the Wind River Reservation, the manner of payment expressly was discussed with the Indian representatives from the Wind River Reservation, and they agreed to it. While the special master decided that Rosebud Sioux Tribe v. Kneip, supra, is distinguishable because the word "convey" was omitted in Article I of the 1904 Agreement, that conclusion fails to acknowledge the inclusion of the word "convey" in Article II, which refers back to Article I and, in my judgment, places undue emphasis on the omission of the word in Article I.

HANSCUM, District Judge, dissenting.

I join in the dissent. Specifically, I would agree with the dissent's proposed holding that the implied reservation of water rights attaching to an Indian reservation should assume any use that is appropriate to the Indian homeland as it progresses and develops.

I depart, however, when Justice Thomas proposes to limit water use to the territorial boundaries of the reservation, thus precluding marketability of the water. Justice Thomas would hold that, as a matter of law, marketing water off the reservation never could be appropriate to the progress and development of the Indian homeland.

I disagree. I would go that additional step. I would hold that sale of water off the reservation should be permitted, provided that, as a factual matter, it could be demonstrated that such marketing contributed to the progress and development of the Indian homeland. I can envision a variety of scenarios where such showing could be made successfully. To preclude the opportunity of proving such a nexus unduly would restrict and hamper the prospective development of the Indian homeland in the future.

APPENDIX B

IN THE SUPREME COURT
STATE OF WYOMING

APRIL TERM, A.D. 1988

Nos. 85-203, 85-204,
85-205, 85-217,
85-218, 85-225,
85-226, 85-236

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE BIG HORN RIVER SYSTEM AND ALL OTHER SOURCES, STATE OF WYOMING.

ORDER DENYING PETITION FOR REHEARING

This case came on before the court upon the Petitions for Rehearing filed on March 25, 1988, by the State of Wyoming, the United States and the Shoshone and Northern Arapaho Tribes, respectively, and the court having carefully considered the matters presented therein, including the record and the opinion of the court, finds that the Petitions for Rehearing should be denied, and it therefore is

ORDERED that the Petitions for Rehearing be, and the same hereby are, denied.

Dated April 22nd, 1988.

BY THE COURT

/s/ C. Stuart Brown
C. STUART BROWN
Chief Justice

APPENDIX C

IN THE DISTRICT COURT
FOR THE FIRST JUDICIAL DISTRICT
STATE OF WYOMING, COUNTY OF LARAMIE

Docket No. 101-234

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE BIG HORN RIVER SYSTEM AND ALL OTHER SOURCES, STATE OF WYOMING.

[Filed May 24, 1985]

ORDER, DENYING TREATY PRIORITY DATE MODIFYING AND CORRECTING FINDINGS OF FACT AND CONCLUSIONS OF LAW, RULING ON CERTAIN SPECIFIED CLAIMS, AND DEFERRING ACCEPTANCE OF RECOMMENDED FINAL DECREE IN THE SPECIAL MASTER'S SUPPLEMENTAL AND FINAL REPORT

This Decision reviews the Special Master's "Supplemental and Final Report" dated June 1, 1984, which concerns that portion of the general adjudication of all the rights to use water in the Big Horn River System and all other sources, dealing with claims of twenty-six (26) non-Indian parties for water rights based on the purchase of land by a non-Indian from an Indian allottee or successor. All the land was included originally within the Wind River Indian Reservation of 1868.

After submission of the Special Master's Report to the Court, a hearing was held in Lander, Wyoming, on September 28, 1984, to determine whether the Report should be confirmed. Subsequently, the Court raised questions about what factors distinguished this group of claimants from those other claimants similarly situated who have not appeared, inviting comments by letter. Responses have been received, generally indicating that there is no significant distinction. Therefore, it is the determination of the Court that these claims have no special distinction which demand that they receive special and separate consideration. The factual issues will be similar to those of other parties to be reviewed at a later time.

The Court will, however, discuss the general points of law applicable to these parties. Claimants are seeking a reserved water right with an 1868 Treaty priority date ("Walton rights"), and in the alternative, a right for water service from the Wind River Federal Irrigation Project based on state permits issued in 1905 to the United States or, for those lands outside the Project, for rights under state permits or certificates issued at varying times. The Court holds that these parties are not entitled to an 1868 priority date. Reservation reserved rights are rights created by the courts solely for the protection and enjoyment of Indian tribes so that they can make their reservations their homelands. (Decision of May 10, 1983, page 17) These rights do not pass to successors in interest to Indian lands. (Decision of May 10, 1983, pages 23-23.) Therefore, this Court will not award to non-Indian parties an 1868 priority date for their water rights.

The purpose of the third phase of this general adjudication is the consideration and review of the status in Division III of all state water permits, current and expired, and adjudicated certificates. It is proper that the claims under state law of the twenty-six parties be ruled upon by the Court at a later time in the proceedings with

other claimants who are similarly situated. To facilitate matters, where possible to do so, the Court has accepted findings of fact of the Special Master as amended by the Court for these claims but will defer ruling upon all issues except the "Walton Right" claims which are rejected by the Court. The record reflects corrections introduced and accepted at the September 28, 1984, hearing in Lander.

The claims of Landis Webber, Red Creek Cattle Company, Bertha Reed Jones and Grace Graboski (Claims 24, 25, 26) have been dismissed by the Special Master on the grounds that the holding in *Merrill v. Bishop*, 74 Wyo. 298, 287 P.2d 620 (1955) makes these claims *res judicata*.

It is generally stated that the doctrine of *res judicata* applies to repetitious suits involving the same cause of action whereby the parties to the suit and their privies are thereafter bound as to those facts and matters actually or necessarily adjudicated. *Bard Ranch Company v. Weber*, 557 P.2d 722, 727 (Wyo. 1976).

Res judicata was discussed by the Wyoming Supreme Court in *CLS v. CLJ, JME and CKE*, decided January 18, 1985. In that case, the court cited a 1972 Wyoming case and said:

> "'Res judicata is the term applied to the rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies; and, as to them, it constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action.' *Barrett v. Town of Guernsey, Wyo.*, 652 P.2d 397, 398 (1982)." (Slipsheet, page 1)

The first *Merrill v. Bishop* case, 69 Wyo. 45, 237 P.2d 186 (1951) involved an action based on tort on the part of officials. The question decided by the Wyoming Supreme Court was whether or not a demurrer filed to the

petition was properly sustained on account of defect of parties. The second *Merrill* case (1955, *supra*) involved the same state officials, although some names had changed, but it was a cause of action to enjoin water officials from interfering with water rights and closing head gates. Plaintiffs contended that their water rights originated under the Treaty of 1868 and that their priority dates were likewise 1868. The Court did not decide what should be the plaintiffs' priority dates although there was some discussion of the issue. It held only that the plaintiffs failed in their burden of proof to justify the granting of injunctive relief. At page 315 of *Merrill, supra*, the Supreme Court of Wyoming was frustrated by the failure of the plaintiffs to specify the acreage irrigated by them.

> "There was some testimony that the lands of some of the plaintiffs were irrigated by the Indians, but here was no testimony of the specific number of acres irrigated by any of them. Nor is there any testimony as to whether or not the white men enlarged the use thereof as required under the rule of United States v. Hibner, supra [27 F.2d 909 (D.C., Idaho)], assuming the holding in that case to apply herein. In short, there is no testimony which would have enabled the trial court to make an intelligent order of injunction."

Earlier in the same decision at page 315 the court recommended that uncertainty as to the plaintiffs' rights might be resolved as follows:

> "To settle the controversy herein, the Board of Control in cooperation with plaintiffs and others situated likewise, should proceed to determine the rights of the latter by proceedings similar to those taken in other cases."

Apparently proceedings subsequently took place before the Board of Control and adjudicated certificates contain-

ing a priority date of 1905 were prepared. See Supplemental and Final Report of Special Master Roncalio, June 1, 1984 at pages 47, 48, and 49. Now, after many years, claimants Landis Webber for Red Creek Cattle Company, Bertha Lee Jones and Grace Graboski seek to relitigate the decision of the Board of Control. Presumably if the plaintiffs or their predecessors in interest had wished to seek review of the administrative decisions, they could have proceeded in court. Thus, the issue here would appear to be whether the doctrine of *res judicata* applies to the administrative determination of the Board of Control, in awarding a 1905 priority to the adjudicated certificates, rather than a basis found in the decision of the Supreme Court in *Merrill, supra.* The application of *res judicata* to agency decisions has not been clear; however, at least since 1966 the trend appears to favor application of the doctrine. See, Davis, *Administrative Law Treatise,* Vol. 4, Second Edition, Section 21:2, at page 49. As reflected at page 51, the *Restatement of Judgments* now addresses this subject.

> "The second Restatement of Judgments does deal with that subject in § 83, which provides: '(1) Except as stated in Subsections (2), (3), and (4), a valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions, as a judgment of a court.' "

Therefore, it appears that the present situation of Landis Webber, Bertha Lee Jones and Grace Graboski may be distinguishable from *Merrill, supra* on the basis that (1) this is a statutorily-authorized general adjudication of all rights to use water within the Big Horn River system and all other sources and (2) this action does not arise out of tort, nor is it a request for injunctive relief. Nevertheless, the prior administrative decision assigning a priority date to the adjudicated water right precludes further inquiry by the Court for these claimants.

The Court has already stated that non-Indian parties do not have an 1868 reserved right priority date for their water rights. However, as to other claims, not otherwise precluded, a non-Indian may be permitted to use evidence of a previous Indian owner's application of beneficial use to justify his claim under state law to a priority date relating back to the date of first use.

Non-Indians must obtain their water rights under color of state law. A non-Indian acquiring former Indian land is required by state law to make application for a state water permit within a reasonable time, but even if he does not do so, the first application of water for beneficial use would have to be the basis for determining a priority date. (Decision of May 10, 1983, pages 21-24)

The effect of *U.S. v. Hampleman* on the parties in this case has not yet been discussed. The Court can easily resolve the questions raised by *Hampleman* because that case deals only with Indian allottees, there were no conveyances to non-Indians, and, by the facts and the decree, the perpetual injunction doesn't extend to the State of Wyoming, but only applies to the defendant, Albert Hampleman, or his servants, agents and employees. Whether or not the case even addressed the claims of the State of Wyoming is unclear; apparently it did only insofar as the State claims were rejected to allow the injunction. Being an unpublished opinion, *U.S. v. Hampleman* is a weak prop for the theory that Indian allottees convey an 1868 reserved right priority date when land is sold to non-Indians. *U.S. v. Hampleman* and related issues raised by attorney Michael S. Messenger, have already been disposed of by Judge Joffe in his Decision of May 10, 1983:

> "The reserved rights doctrine is a(n) unique Indian right. It does not extend to subsequent purchasers of Indian land." (Page 21)
>
> "It is this Court's view that when Indian reservation land left Indian ownership or United States

Trust status, it lost its original reservation land status for purposes of a reserved water right priority date of 1868." (Page 23)

FINDINGS OF FACT

Upon review of the Report of the Special Master dated June 1, 1984, and upon Motion of the State of Wyoming and review of all objections and exceptions to the Report of the Special Master, Part I, the Court finds the following:

A. The Report of the Special Master, Part I, should be modified in accordance with the objections, exceptions and motions.

B. The Findings of Fact and Conclusions of Law set out on pages 50 and 51 of the Special Master's Report are modified to read as follows:

1. The United States has delivered water to the claimants identified in Claims 1 through 23, upon payment of assessments. Claimants listed in Claims 22 and 23 are not served by the Wind River Federal Irrigation Project.

2. The lands identified in Claims 1 through 26 are each described in applications and permits of record in the Office of the Wyoming State Engineer, and many of these lands have been adjudicated by the Wyoming Board of Control and are described in Certificates of Appropriation.

3. That portion of the report of the Special Master dated December 15, 1982, discussing alienability of reserved water rights, from page 44 through 55, is incorporated herein to the extent it is not inconsistent with the holdings of the Court in its Order dated June 8, 1984, and its Amended Judgment and Decree, regarding reacquired lands.

4. With respect to all Claims numbered 1 through 23, the Court finds that the identified land of each claimant:

A. Is within the Wind River Indian Reservation.

B. Had been regularly irrigated beginning with the date and for the periods mentioned in each claim discussed, and the water thereon put to beneficial use.

5. With respect to Claims 1 through 23, the claimants or their non-Indian predecessors purchased the claimed lands after permits were issued for irrigation of these lands by the Wyoming State Engineer in 1905 .

It is likely that the purchasers of the lands intended to irrigate the lands in accordance with the terms of the applicable permits.

Those claimants who use water from a Federal Irrigation Project are subject to those federal statutes, rules and regulations governing the administration of the project and nothing in these findings, conclusions or decree shall be construed to deprive any such claimant of any right granted or relieve him of any responsibility that is imposed, by federal statutes, rule, regulation, or amendment thereto, governing the administration of the project.

6. With respect to Claims 24, 25, and 26, the Court finds that while there may be evidence to support claims for priority dates predating existing priority dates on these adjudicated certificates, nevertheless, the issue of plaintiffs' priority dates has been finally determined by a competent tribunal.

7. The Findings of Fact for each claimant with respect to legal descriptions, acreage irrigated, sources of diversions, headgate locations, permit

numbers, priority dates, and names of each claimant are not set forth separately from this Order, but are incorporated in it.

8. The annual diversion requirements for the seven units of the Wind River Federal Irrigation Project were established for Indians and set out in the Special Master's Report on Phase I, and were adopted by the Court. The diversion rates as set out in the Finding of Fact and Conclusion of Law for each claim are based upon statutory provisions of one cubic foot per second for 70 acres. (W.S. § 41-4-101, § 44-4-317)

9. The Court finds that there was extensive public notice of these proceedings, and that all individuals who were parties to the litigation received personal notice of the hearings by the Special Master.

10. The Court finds that action by the Court at this time is not required for adjudicated certificates covering lands within Claims 1 through 23.

11. The Court finds that Parts II and III of the Special Master's Supplemental and Final Report are recommendations only. Adjudicated certificates, dated prior to January 1, 1977, should be confirmed subject to the stipulation dated April 15, 1980, of the State, the United States and the Tribes, permitting challenges of certain certificates in accordance with law. The Court has asked for proposals for orderly procedures governing future hearings and actions herein from other parties and anticipates taking action as further information is developed.

CONCLUSIONS OF LAW

A. Non-Indian purchasers of Indian land do not take a reserved water right with an 1868 Treaty priority date.

B. Non-Indian successors to allottees are entitled to water rights with priority dates established by permits

and/or certificates issued by the State of Wyoming, or by evidence of first application of water for beneficial use.

C. The holding in *U.S. v. Hampleman, supra,* is not relevant in this case.

D. *Merrill v. Bishop, supra,* is not *res judicata* as to Claims 24, 25, and 26; however relief for these claimants is precluded by the adjudication of the Board of Control, which established priority dates.

E. The most appropriate time for decision on the claims is at a later time in this case when all state water permits and certificates in Division III will be reviewed.

F. It is proper and expedient for the evidence in the record, as corrected, to be held for consideration by the Court in later proceedings.

NOW THEREFORE, BE IT ORDERED, DECREED AND ADJUDGED that:

I. The Court defers acceptance and ratification of the Special Master's Supplemental and Final Report, Part I as to Claims 1 through 23.

II. All claims by non-Indian successors to Indian lands for water rights with priority dates of July 3, 1868, are denied.

III. The priority dates on Claims 24, 25 and 26 shall be those determined by the Board of Control and reflected on the adjudicated certificates of these claimants.

IV. All adjudicated certificates, dated on or before January 1, 1977, are confirmed, subject to the stipulation dated April 15, 1980, by and between the Indian Tribes, the State of Wyoming, and the United States.

V. The Claims 1 through 23 identified in the Special Master's Report are considered as claims for reinstatement of permits for which the time for filing required

notice has expired, and such permits are hereby reinstated as described below, the findings of fact as set out below regarding these claims shall be made a part of the record, any claim for modification or adjustment of the findings of fact shall be handled later in these proceedings, and the reinstated permits are subject to final adjudication through procedures to be approved by further Order of this Court regarding unadjudicated permits and adjudicated certificates.

VI. Non-Indian successors to allottees are entitled to water rights with priority dates established by permits and/or certificates issued by the State of Wyoming, or by evidence of first application of water for beneficial use.

VII. Part IV of the Special Master's Supplemental and Final Report dated June 1, 1984, shall be further refined and procedures shall be established governing future proceedings.

VIII. Pursuant to Rule 54(b) W.R.C.P. the Court finds that there is no just reason for delay for entry of final judgment on the claims described herein, and therefore, ORDERS same.

Dated this 15th day of May, 1985.

/s/ Alan B. Johnson
ALAN B. JOHNSON
District Judge

[Certificate Omitted in Printing]

CLAIM NO. 1

CLAIMANT: RUDY AND NANCY ZUPENCE

Box 333, Ft. Washakie, Wyoming 82514

Permit No. 6633 and 9080

Acres Claimed: 50

Acres Reinstated: 25.4

Diversion Rate (C.F.S.): 0.71

Diversion Structure: Ray Canal

Headgate Location: T1S R1W, Section 22

Water Source: South Fork Little Wind River

Priority Date: March 18, 1905

Township 1 South, Range 1 West of the W.R.M.:

Section 5: NE/4 SW/4, N/2 SE/4 SW/4, W/2 SE/4 SE/4 SW/4

CLAIM NO. 2

CLAIMANT: ALBERT HORNECKER

Route 61, Ethete, Wyoming

Permit No. 6633 and 9080, partial coverage

Acres Claimed: 420.97

Acres Reinstated: 108.16

Diversion Rate (C.F.S.): 1.55

Diversion Structure: Ray Canal

Headgate Location: T1S R1W, Section 22

Water Source: South Fork Little Wind River

Priority Date: March 18, 1905

Township 1 South, Range 1 East of the W.R.M.:

	Parcel and Land Description		Reinstated Acreage
D-1:	Section 21:	SW/4 SW/4	38.85
D-2:	Section 27:	N/2 NW/4	0.00
D-3:	Section 28:	N/2 SE/4	0.00
D-4:	Section 28:	SW/4 SE/4, SE/4 SW/4	2.00
D-5:	Section 29:	SE/4 SW/4	31.70
D-6:	Section 32:	NW/4 NE/4	35.61
		Totals	108.16

CLAIM NO. 3

CLAIMANT: CHARLES M. ROEMER

Box 563, Lander, Wyoming 82520

Permit No. 6633 and 9080

Acres Claimed: 53

Acres Reinstated: 25

Diversion Rate (C.F.S.): 0.36

Diversion Structure: Ray Canal

Headgate Location: T1S R1W, Section 22

Water Source: South Fork Little Wind River

Priority Date: March 18, 1905

Township 1 South, Range 1 West of the W.R.M.: Section 5: S/2 NW/4 SE/4, NW/4 NW/4 SE/4, SW/4 SE/4

CLAIM NO. 4

CLAIMANT: HOMER BLOMBERG, SR.

P.O. Box 229, Riverton, Wyoming 82501

Permit No. 6634

Acres Claimed: 15.47

Acres Reinstated: 15.47

Diversion Rate (C.F.S.): 0.21

Diversion Structure: Left Hand Canal

Headgate Location: T1N R3E, Section 28

Water Source: Main Stem Wind River

Priority Date: March 18, 1905

Township 1 South, Range 4 East of the W.R.M.: Section 10: E/2 NW/4 NW/4

CLAIM NO. 5

CLAIMANT: KENNETH AND GLADYS HANSEN

Box 55 Star Route, Arapahoe, Wyoming 82510

Permit No. 6632

Total Acres Claimed: 152

Acres Reinstated: 81

Diversion Rate (C.F.S.): 1.16

Diversion Structure: Coolidge Canal

Headgate Location: T1N R1W, Section 36

Water Source: Main Stem Little Wind River

Priority Date: March 18, 1905

C-1: *Township 1 South, Range 1 East of the W.R.M.*:

Section 1: E/2 SE/4
Acres Claimed: 42
Acres Reinstated: 42

C-2: *Township 1 South, Range 1 East of the W.R.M.*:

Section 11: W/2 NW/4
Acres Claimed: 71
Acres Reinstated: 0
[Covered by adjudicated certificate of appropriation, Proof No. 18419 (Book 6, p. 392) Priority March 18, 1905]

C-3: *Township 1 South, Range 1 East of the W.R.M.*:

Section 12: NW/4 NE/4
Acres Claimed: 39
Acres Reinstated: 39

CLAIM NO. 6

CLAIMANT: JAMES NIRIDER

Box 62, Arapahoe, Wyoming 82501

Permit No. 6632

Total Acres Claimed: 248.46

Acres Reinstated: 176.46

Diversion Rate (C.F.S.): 2.52

Diversion Structure: Coolidge Canal

Headgate Location: T1N R1W, Section 36

Water Source: Main Stem Little Wind River

Priority Date: March 18, 1905

F-1: *Township 1 South, Range 1 East of the W.R.M.*:

Section 2: E/2 SE/4, SE/2 NE/4
Acres Claimed: 97.3
Acres Reinstated: 97.3

F-2: *Township 1 South, Range 2 East of the W.R.M.*:

Section 7: SE/4 NW/4, Lot 2
Acres Claimed: 79.16
Acres Reinstated: 79.16

F-3: *Township 1 North, Range 1 East of the W.R.M.*:

Section 35: E/2 SE/4
Acres Claimed: 72.0
Acres Reinstated: .0
[Adjudicated, Permit No. 6632, Proof No. 18570, Priority Date March 18, 1905]

CLAIM NO. 7

CLAIMANT: THOMAS REED

P.O. Box 45, Lander, Wyoming 82520

Permit No. 6632

Total Acres Claimed: 170

Acres Reinstated: 59.4

Diversion Rate (C.F.S.): 0.85

Diversion Structure: Coolidge Canal

Headgate Location: T1N R1W, Section 36

Water Source: Main Stem Little Wind River

Priority Date: March 18, 1905

G-1: *Township 1 South, Range 1 East of the W.R.M.*:

Section 15: S/2 NW/4
Acres Claimed: 55
Acres Reinstated: 0
Adjudicated Certificate

G-2: *Township 1 South, Range 1 East of the W.R.M.*:

Section 22: S/2 NE/4
Acres Claimed: 60
Acres Reinstated: 4.4

G-3: *Township 1 South, Range 1 East of the W.R.M.*:

Section 22: N/2 NW/4
Acres Claimed: 55
Acres Reinstated: 55

CLAIM NO. 8

CLAIMANT: DONALD BATH;
DHB & CO., and PLB & CO.

Star Route, Box 95, Arapahoe, Wyoming 82510

Permit No. 6582 and 6630

Total Acres Claimed: 492.95

Acres Reinstated: 131.80

Diversion Rate (C.F.S.): 2.20

Diversion Structure: Subagency Canal

Headgate Location: T1S R2E, Section 10

Water Source: Main Stem Little Wind River

Priority Date: May 5, 1905

B-1: *Township 1 South, Range 3 East of the W.R.M.*:

Section 13: E/2 NW/4
Acres Claimed: 78.1
Acres Reinstated: 0.0
Adjudicated, Permit No. 6582, Proof No. 19290 (Book 6, p. 680),
Priority date: May 5, 1905

B-2: *Township 1 South, Range 3 East of the W.R.M.*:

Section 14: E/2 NW/4
Acres Claimed: 78.85
Acres Reinstated: 0.0
Adjudicated, Permit No. 6582, Proof No. 23468 (Book 11, p. 54)
Priority date: May 5, 1905

B-3: *Township 1 South, Range 3 East of the W.R.M.*:

Section 14: SW/4 NE/4 and NW/4 SE/4
Acres Claimed: 74.2
Acres Reinstated: 0.0

Adjudicated, Permit No. 6582, Proof No. 23468 (Book 11, p. 54)
Priority date: May 5, 1905

B-4: *Township 1 South, Range 3 East of the W.R.M.*:

Section 14: SE/4 NE/4 and NE/4 SE/4
Acres Claimed: 69.3
Acres Reinstated: 69.3

B-5: *Township 1 South, Range 3 East of the W.R.M.*:

Section 15: N/2 NE/4
Acres Claimed: 74.25
Acres Reinstated: 0.0
Adjudicated, Permit No. 6582, Proof No. 23468 (Book 11, p. 54)
Priority date: May 5, 1905

B-6: *Township 1 South, Range 3 East of the W.R.M.*:

Section 16: SE/4 SE/4 (33.25 acres)
Section 21: E/2NE/4 (25.00 acres)
Acres Claimed: 58.25
Acres Reinstated: 25.00

B-7: *Township 1 South, Range 3 East of the W.R.M.*:

Section 22: NW/4
Acres Claimed: 60
Acres Reinstated: 37.5

CLAIM NO. 9

CLAIMANT: BRADFORD BATH

Star Route, Box 95, Arapahoe, Wyoming 82510

Permit No. 6582 and 6630

Total Acres Claimed: 79.0

Acres Reinstated: 75.9

Diversion Rate (C.F.S.): 1.13

Diversion Structure: Subagency Canal

Headgate Location: T1S R2E, Section 10

Water Source: Main Stem Little Wind River

Priority Date: May 5, 1905

A-1: *Township 1 South, Range 3 East of the W.R.M.*:

Section 14: W/2 SW/4 (except 2.76 acres)
Acres Claimed: 79.0
Acres Reinstated: 79.0

CLAIM NO. 10

CLAIMANT: ARTHUR AND WANDA LUCAS

Box 22, Star Route, Arapahoe, Wyoming 82510

Permit No. 6582 and 6630

Total Acres Claimed: 31

Acres Reinstated: 12

Diversion Rate (C.F.S.): 0.17

Diversion Structure: Subagency Canal

Headgate Location: T1S R2E, Section 10

Water Source: Main Stem Little Wind River

Priority Date: May 5, 1905

O-1: *Township 1 South, Range 3 East of the W.R.M.*:

Section 17: SW/4 SE/4
Acres Claimed: 19
Acres Reinstated: 0
Adjudicated Permit No. 6582, Proof No. 18412 (Book 6, p. 392)
Priority Date: May 5, 1905

O-2: *Township 1 South, Range 3 East of the W.R.M.*:

Section 20: Westerly 990' of E/2 NE/4
Acres Claimed: 12
Acres Reinstated: 12

CLAIM NO. 11

CLAIMANT: HENRY AND VIOLET LEWIS

Arapahoe Route, Box 3060, Riverton, Wyoming 82510

Permit No. 6582 and 6630

Total Acres Claimed: 62

Acres Reinstated: 62

Diversion Rate (C.F.S.): 0.89

Diversion Structure: Subagency Canal

Headgate Location: T1S R2E, Section 10

Water Source: Main Stem Little Wind River

Priority Date: May 5, 1905

N-1 *Township 1 South, Range 3 East of the W.R.M.*:

Section 12: E/2 SE/4
Acres Claimed: 62
Acres Reinstated: 62

CLAIM NO. 12

CLAIMANT: GRIFFIN BROTHERS, INCORPORATED

by HERSCHEL GRIFFIN

Box 322, Riverton, Wyoming 82501

TOTAL

Total Acres Claimed: 456

Acres Reinstated: 15

LEFT HAND CANAL

Permit No. 6634

Total Acres Claimed: 15

Acres Reinstated: 13.4

Diversion Rate (C.F.S.): 0.21

Diversion Structure: Left Hand Canal

Headgate Location: T1N R3E, Section 28

Water Source: Main Stem Wind River

Priority Date: March 18, 1905

P-1: *Township 1 South, Range 3 East of the W.R.M.*:

Section 1: S/2 of Lot 1, SE/4 NE/4, N/2 NE/4 SE/4
Acres Claimed: 5
Acres Reinstated: Both Tracts (P-1 and P-2)-13.4

P-2: *Township 1 South, Range 3 East of the W.R.M.*:

Section 1: SW/4 NE/4, N/2 NW/4 SE/4, S/2 of Lot 2 (NW/4 NE/4)
Acres Claimed: 10
Acres Reinstated: Both tracts (P-1 & P-2)-13.4

SUBAGENCY CANAL

Permit No. 6582

Total Acres Claimed: 85

Acres Reinstated: 0

Diversion Structure: Subagency Canal

Headgate Location: T1S R2E, Section 10

Water Sources: Main Stem Little Wind River

Priority Date: May 5, 1905

P-3: *Township 1 South, Range 4 East of the W.R.M.*:

Section 7: Lot 1 (NW/4 NW/4), NE/4 NW/4, NW/4 NE/4
Acres Claimed: 85
Acres Reinstated: 0
Adjudicated, Permit No. 6582, Proof No. 18411 (Book 6, p. 391)
Priority Date: May 5, 1905

DOUBLE DITCH

Permit No.

Total acres Claimed: 356

Acres Reinstated: 0

Diversion Rate (C.F.S.): 0

Diversion Structure: Double Ditch

Headgate Location: T1S R3E, Section 23

Water Source: Main Stem Little Wind River

P-4: *Township 1 South, Range 4 East of the W.R.M.*:

Section 16: Lot 3 (SW/4 NW/4), W/2 SW/4
Section 17: Lot 2, Lot 3, E/2 SE/4
Acres Claimed: 170
Acres Reinstated: 0

P-5: *Township 1 South, Range 4 East of the W.R.M.*:

Section 17: NE/4 SW/4, NW/4 SE/4
Acres Claimed: 61
Acres Reinstated: 0

P-6: *Township 1 South, Range 4 East of the W.R.M.*:

Section 17: SW/4 SE/4
Section 20: NW/4 NE/4
Acres Claimed: 30
Acres Reinstated: 0

P-7: *Township 1 South, Range 4 East of the W.R.M.*:

Section 19: SE/4 NW/4, SW/4 NE/4, NW/4 SE/4, NE/4 SW/4
Acres Claimed: 95
Acres Reinstated: 0

These tracts are covered by Adjudicated Certificates.

CLAIM NO. 13

CLAIMANT: DON VAN RIPER

Ruote 61, Box 63, Lander, Wyoming 82601

Permit No. 6632

Total Acres Claimed: 54

Acres Reinstated: 23.0

Diversion Rate (C.F.S.): 0.77

Diversion Structure: Coolidge Canal

Headgate Location: T1N R1W, Section 36

Water Source: Main Stem Little Wind River

Priority Date: March 18, 1905

K-1: *Township 1 South, Range 2 East of the W.R.M.*:

Section 6: Lot 4 (NW/4 NW/4)
Lot 5 (SW/4 NW/4)

CLAIM NO. 14

CLAIMANT: RALPH AND EILEEN URBIGKIT

Crowheart, Wyoming 82512

TOTAL

Total Acres Claimed: 325.7

Acres Reinstated: 317.0

WIND RIVER "A" CANAL

Permit No. 6614 and 6625

Total Acres Claimed: 127.7

Acres Reinstated: 127.7

Diversion Rate (C.F.S.): 1.82

Diversion Structure: Wind River "A" Canal

Headgate Location: T5N R5W, Section 14

Water Source: Main Stem Wind River

Priority Date: April 27, 1905

I-1: *Township 4 North, Range 4 West of the W.R.M.*:

Section 2: E/2 SW/4

I-2: *Township 4 North, Range 4 West of the W.R.M.*:

Section 2: SW/4 SW/4
Acres Claimed, both I-1 and I-2: 96.3
Acres Reinstated, both I-1 and I-2: 96.3

I-3: *Township 4 North, Range 4 West of the W.R.M.*:

Section 2: SW/4 NW/4

I-4: *Township 4 North, Range 4 West of the W.R.M.*:

Section 2: SE/4 NW/4
Acres Claimed, both I-3 and I-4: 31.4
Acres Reinstated, both I-3 and I-4: 31.4

DRY CREEK BENCH CANAL

Permit No. 6626

Total Acres Claimed: 198.0

Acres Reinstated: 198.0

Diversion Rate (C.F.S.): 2.83

Diversion Structure: Dry Creek Bench Canal

Headgate Location: T4N R4W, Section 6

Water Source: Dinwoody Creek

Priority Date: April 27, 1905

I-5: *Township 4 North, Range 4 West of the W.R.M.*:

Section 16: S/2 NE/4, SE/4 NW4
Acres Claimed: 94
Acres Reinstated: 94

I-6: *Township 4 North, Range 4 West of the W.R.M.*:

Section 16: N/2 SE/4, NE/4 SW/4
Acres Claimed: 104
Acres Reinstated: 104

CLAIM NO. 15

CLAIMANT: DALE AND PATRICIA URBIGKIT

Permit No. 6626

Total Acres Claimed: 265

Acres Reinstated: 200

Diversion Rate (C.F.S.): 2.86

Diversion Structure: Dry Creek Bench Canal

Headgate Location: T4N R4W, Section 6

Water Source: Dinwoody Creek

Priority Date: April 27, 1905

H-1: *Township 4 North, Range 4 West of the W.R.M.*:

Section 4: SW/4 NE/4, NW/4 SE/4, Lot 6
Acres Claimed: 65
Acres Reinstated: 0
Adjudicated

H-2: *Township 4 North, Range 4 West of the W.R.M.*:

Section 4: SW/4, S/2 NW/4, S/2 of Lot 3, S/2 of Lot 4
Acres Claimed: 200
Acres Reinstated: 200

CLAIM NO. 16

CLAIMANT: RALPH FLOYD URBIGKIT

Crowheart: Wyoming 82512

Permit No. 6625 and 6626

Total Acres Claimed: 259.60

Acres Reinstated: 153.85

Division Rate (C.F.S.): 2.20

Diversion Structure: Wind River "A" Canal

Headgate Location: T5N R5W, Section 14

Water Source: Main Stem Wind River

Priority Date: April 27, 1905

J-1: *Township 4 North, Range 4 West of the W.R.M.*:

Section 11: SE/4, SE/4 NE/4
Acres Claimed: 153.85
Acres Reinstated: 153.85

J-2: *Township 4 North, Range 4 West of the W.R.M.*:

Section 15: NW/4 NE/4, N/2 NW/4
Acres Claimed: 105.75
Acres Reinstated: 0.0
Adjudicated

CLAIM NO. 17

CLAIMANT: JOHN (JR.) AND BARBARA LONGFELLOW

Box 46, Star Route Arapahoe, Wyoming 82510

Permit No. 6603 and 6632

Total Acres Claimed: 225

Acres Reinstated: 211

Diversion Rate (C.F.S.): 3.21

Diversion Structure: Coolidge Canal

Headgate Location: T1N R1W, Section 36

Water Source: Main Stem Little Wind River

Priority Date: March 18, 1905

Township 1 South, Range 2 East of the W.R.M.:

Section 8: NE/4 NE/4
Section 9: W/2 NW/4, NE/4 NE/4
Section 16: SW/4 SW/4
Section 17: SE/4 SE/4
Acres Claimed: 240 (225 net)
Acres Reinstated: 211

CLAIM NO. 18

CLAIMANT: VERL SNEED AND
HOMER BLOMBERG, JR.

by ANNA MERLE BLOMBERG

P.O. Box 229, Riverton, Wyoming 82510

Permit No. 6634

Total Acres claimed: 35

Acres Reinstated: 0

Diversion Structure: Left Hand Canal

Headgate Location: T1N R3E, Section 28

Water Source: Main Stem Wind River

Priority Date: May 5, 1905

Township 1 South, Range 4 East of the W.R.M.:

Section 9: NE/4 NE/4
Adjudicated, Permit No. 6634, Proof No. 22728 (Book 10, p. 280)
Priority Date: May 5, 1905

CLAIM NO. 19

CLAIMANT: KATHRYN LINDEN DICKINSON

Route 2, Box 555, Riverton, Wyoming 82510

Permit No. 6582 and 6630

Total Acres Claimed: 16

Acres Reinstated: 16

Diversion Rate (C.F.S.): 0.23

Diversion Structure: Subagency Canal

Headgate Location: T1S R2E, Section 10

Water Source: Main Stem Little Wind River

Priority Date: May 5, 1905

Township 1 South, Range 3 East of the W.R.M.:

Section 17: SE/4 SE/4

CLAIM NO. 20

CLAIMANT: KENNETH AND PATRICIA PERSSON

680 Bonnie Brae, Lander, Wyoming 82520

Permit No. 6633 and 9080

Total Acres Claimed: 100

Acres Reinstated: 0

Diversion Structure: Ray Canal

Headgate Location: T1S R1W, Section 22

Water Source: South Fork Little Wind River

Priority Date: March 18, 1905

Township 1 South, Range 1 West of the W.R.M.:

Section 25: W/2 SE/4
Adjudicated, Permits No. 9080 and 6633, Proof No. 18592 (Book 6, p. 463)
Priority Date: March 18, 1905
Section 25: E/2 SW/4
Adjudicated, Permits No. 9080 and 6633, Proof No. 18586 (Book 6, 463)
Priority Date: March 18, 1905

CLAIM NO. 21

CLAIMANT: CHARLES RICHARDSON

Arizona

Permit No. 11240

Total Acres Claimed: 60

Acres Reinstated: 60

Diversion Rate (C.F.S.): 0.86

Diversion Structure: Dry Creek Bench Canal

Headgate Location: T4N R4W, Section 6

Water Source: Dinwoody Creek

Priority Date: April 27, 1905

R-1: *Township 4 North, Range 3 West, of the W.R.M.:*

Section 28: SE/4 SW/4, Lot 6 (NW/4 SW/4), Lot 11 (SE/4 NW/4)

Section 33: N/2 NE/4 NW/4

CLAIM NO. 22

CLAIMANT: DR. AND MRS. RICHARD D. MARTIN

Box 637, Crowheart, Wyoming 82512

Permit No. 15864

Total Acres Claimed: 80

Acres Reinstated: 63.6

Diversion Rate (C.F.S.): 0.77

Diversion Structure: North Fork Meadow Creek No. 2

Headgate Location: T4N R4W, Section 33

Water Source: Meadow Creek

Priority Date: September 27, 1920

E-1: *Township 4 North, Range 5 West, of the W.R.M.:*

Section 36: W/2 NW/4 and NW/4 SW/4

CLAIM NO. 23

CLAIMANT: ROBERTA PERALTA

Red Creek Ranch, Crowheart, Wyoming 82512

Permit No. 17855 and 18073

Total Acres Claimed: 456

Acres Reinstated: 57

Diversion Rate (C.F.S.): 0.81

Diversion Structure: Millers Red Creek

Headgate Location: T5N R6W, Section 13

Water Source: Red Creek, Tributary to Big Wind River

Township 5 North, Range 5 West of the W.R.M.:

Section 7: SE/4 SE/4, Lot 6, NE/4 SE/4
Acres Claimed: 85.25
Acres Irrigated: 47
Acres Reinstated: 0
Adjudicated, Permit No. 14623, Proof No. 18405,
(Book 6, p. 391)
Priority Date: February 3, 1917

Section 7: Lot 10 (NW/4 SW/4), Lot 11 (SW/4 NW/4)
Acres Claimed: 0
Acres Reinstated: 0

Section 7: SW/4 SE/4
Acres Claimed: 28
Acres Reinstated: 28
Permit No. 18073, Priority Date April 21, 1932

Section 7: Lot 8 (NE/4 SW/4) SE/4 SW/4,
Lot 7 (NE/4 SE/4)

Acres Claimed: 24
Acres Irrigated: 24
Acres Reinstated: 21

Three acres of SE/4 SW/4—Adjudicated. Permit No. 17849, Proof No. 25490) Book 13, p. 263) Priority date March 2, 1931

All other acres—Permit No. 17855, Priority Date March 2, 1931

Section 8: Lot 6, NW/4 SW/4, SW/4 SW/4
Acres Claimed: 72.87
Acres Irrigated: 30
Acres Irrigated: 0
Adjudicated, Permit No. 14623, Proof No. 18405, (Book 6, p. 391)
Priority Date: February 3, 1917

Section 18: Lot 1 (NW/4 NW/4), Lot 2, NE/4 NW/4
Acres Claimed: 48
Acres Irrigated: 48
Acres Reinstated: 8

19 acres of Lot 1 and 21 acres of NE/4 NW/4, a total of 40 acres—Adjudicated, Permit No. 17849, Proof No. 25490 (Book 13, Page 263).
Priority Date: March 2, 1931

All other acres: Permit No. 17855, Priority date—March 2, 1931

CLAIM NO. 24

Claimant: LANDIS WEBBER
for RED CREEK CATTLE COMPANY
Wyoming

Total Acres Claimed: 274

Acres Reinstated: None

Township 8 North, Range 2 East of the W.R.M.:

Section 5: Lot 2 (NW/4 NE/4)
Lot 3 SE/4 NW/4

CLAIM NO. 24

CLAIMANT: BERTHA LEE JONES

Wyoming

Total Acres Claimed: 240

Acres Reinstated: None

Township 9 North, Range 2 East of the W.R.M.:

Section 35: SE/4 NW/4, Lot (NE/4 NW/4), W/2 SE/4, W/2 NE/4

CLAIM NO. 26

CLAIMANT: GRACE GRABOSKI

Wyoming

Total Acres Claimed: 200

Acres Reinstated: None

Township 9 North, Range 2 East of the W.R.M.:
Section 35: Lot 3 (SE/4, NW/4), W/2 SW/4, E/2 SW/4

APPENDIX C-1

IN THE SUPREME COURT
STATE OF WYOMING

Case No. 85-203, 85-204, 85-205,
85-217, 85-218, 85-225, 85-226

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE BIG HORN RIVER SYSTEM AND ALL OTHER SOURCES, WATER DIVISION NO. 3, STATE OF WYOMING

[Filed Oct. 30, 1985]

ORDER ON APPEAL PROCEDURES

Having considered the major parties' Joint Motion on Appeal Procedures and in reliance on the representations made therein, the motion being well taken by the Court, it is Ordered pursuant to W.R.A.P. 16:

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1. *Categories of Claims.*

   a. The claims, for the purposes of this appeal, shall be categorized as follows:

      1. *Type 1.* Reserved water right claims made by the United States and the Tribes quantified on the basis of Practicably Irrigable Acres (appeals from Amended Judgment and Decree, dated May 15, 1985, and filed on May 24, 1985).

2. *Type 2.* Other reserved water right issues including, but not limited to, administration, groundwater and claims other than those quantified on the basis of Practicably Irrigable Acres, also made by the United States and Tribes (appeals from Amended Judgment and Decree, dated May 15, 1985, and filed on May 24, 1985).

3. *Type 3.* Water right claims made by private parties, asserting rights as successors in interest to individual Indians (appeals from Order, Denying Treaty Priority Date Modifying and Correcting Findings of Fact and Conclusions of Law, Ruling on Certain Specified Claims, and Deferring Acceptance of Recommended Final Decree in the Special Master's Supplemental and Final Report, dated May 15, 1985, and filed on May 24, 1985).

b. Each party shall appear through separate briefs and oral argument with respect to each type of claim.

2. *Briefs and Appendices.* Briefs and appendices shall conform to W.R.A.P. 5.05 and 5.06, except as set forth below:

a. Briefs for issues raised by Type 1 and briefs for issues raised by Type 2 claims.

(1) Length:

(a) Principal briefs shall not exceed 145 printed pages by letter press or 200 pages by any other process of duplicating and copying.

(b) Reply briefs shall not exceed 75 printed pages by letter press or 100 pages by any other process of duplicating or copying.

(2) Time:

The following briefing schedule is established for each of the above three types of claims:

(a) Appellants shall file and serve briefs on or before December 2, 1985.

(b) Appellees shall file briefs on or before February 3, 1986.

(c) Reply briefs shall be filed on or before March 5, 1986.

(3) Service of the full text of all briefs among the major parties and upon all parties appearing as appellants or appellees shall be by commercial courier, e.g. Federal Express.

(4) With respect to appellants' opening briefs, only the cover and the Statement of the Issues from said briefs need be served on all other parties by first class mail. Inserted in the mailing shall be a written notice that the full text of said brief may be obtained, at the briefing party's expense, by written or telephonic request to the briefing party.

b. Addenda or appendices shall be liberally utilized to bring to the attention of the Court portions of the record, statutes, legislative histories, rules and regulations, administrative materials, etc., or summary thereof. On or before April 1, 1986, the major parties shall prepare Joint Appendices in bound volumes, containing all documents referred to in said briefs. Thereafter, on or before April 25, 1986, the major parties shall resubmit their briefs, amended only by the insertion of specific references to the Joint Appendices. This

provision shall not preclude the major parties or other parties from including separate appendices with their individual briefs, should that appear to be appropriate.

3. *Oral Arguments.* The provisions of W.R.A.P. 6 shall apply to oral arguments herein, except as set forth below:

   a. Separate settings shall be made for the oral arguments on each of the three types of claims set forth above. In order to minimize redundancy in oral arguments, arguments on Type 1 claims shall be set to be made first, followed by arguments on Type 2 and Type 3 claims, in that order.

   b. Time:

      (1) With respect to the oral arguments on Type 1 and the oral arguments on Type 2 claims, counsel on each side shall occupy not more than 60 minutes in the argument. Counsel shall be responsible for division of arguments when more than one party desires to appear as appellant or appellee on a particular type of claim.

      (2) With respect to Type 3 claims, counsel on each side shall occupy not more than 30 minutes in the argument.

4. *Record.* In keeping with the trial court's Order Defining, Correcting and Authorizing Supplementation and Retention of the Record, entered September 16, 1985:

   The Clerk of the District Court shall retain custody of the complete record (other than the papers to be delivered to the Clerk of the Supreme Court) at the fourth floor vault of the Barrett Building in Cheyenne until such time

as the parties have filed all briefs and prepared a joint appendix and the Clerk is notified by a party appellant that the record should be transmitted, or at such time as this Court or the District Court shall order transmission of the record.

SO ORDERED this 30th day of October, 1985.

/s/ Richard V. Thomas
Chief Justice

APPENDIX D

IN THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT
STATE OF WYOMING, COUNTY OF LARAMIE

Docket No. 101-234

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE BIG HORN RIVER SYSTEM AND ALL OTHER SOURCES, STATE OF WYOMING.

[Filed May 24, 1985]

AMENDED JUDGMENT AND DECREE

THIS MATTER having come before the Court on assignment from the Honorable Harold Joffe, District Judge, Retired, and the Court having reviewed the Report of the Honorable Teno Roncalio, Special Master, dated December 15, 1982, and the Court having reviewed the Findings of Fact and Conclusions of Law, Judgment and Decree of Judge Joffe, dated May 10, 1983, and the Court having heard the motions of the parties to amend the Findings and Judgment on July 14, 1983, and November 15, 1983, and the Court having accepted Stipulations A, B, C, D, and E and Owl Creek Basin, tendered by the parties on November 15, 1983, and being fully advised in the premises, the Court finds as follows:

1. The Order Ruling on Motions to Alter or Amend the Decision of May 10, 1983, filed June 8, 1984, should be amended to read:

"State of Wyoming Motion to Amend Paragraph 3 of the Judgment and Decree: b. To provide that the priority dates for reacquired lands are those dates when each tract was reacquired.

"After consideration of the arguments submitted by the parties the Court will amend the decision of Judge Joffe, holding that the priority date of reacquired acreage owned by Indians in fee or by the United States in trust for the Tribes shall be the earlier date of the applicable state water permit or, the date land left Indian ownership and was purchased by a non-Indian or, the date of first application of water for beneficial use.

"The date of the applicable state water permit shall be the date as identified as 'water right date' set out in Exhibits A, B, C, and D, entered into the record on November 15, 1983, and to which the major parties have stipulated."

2. Findings of Fact number 98, and Conclusions of Law number 9 are deleted from the Decision of May 10, 1983, and Conclusions of law numbers 6 and 13 in the Decision of May 10, 1983, are amended to conform to the Court's later rulings.

3. All other Findings of Fact and Conclusions of Law contained in the Decision of May 10, 1983, are hereby incorporated by reference and made a part of this Amended Judgment and Decree.

AMENDED JUDGMENT AND DECREE

NOW THEREFORE, based on the Findings of Fact and Conclusions of Law as set out above, the Court approves and ADOPTS the Special Master's Report, except as inconsistent with this Decision; IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The United States has reserved, by virtue of the Treaty of Fort Bridger, July 3, 1868, and for the benefit of the Shoshone and Arapahoe Tribes of the Wind River

Indian Reservation, the right to divert water, or to have water diverted, in the amounts set forth hereby and from the streams set forth herein, and that said right has a priority date of July 3, 1868.

Description/Source	Awarded Measure In Acres	Awarded Annual Diversion In Acre-Feet
PROJECT LANDS—HISTORIC		
WIND RIVER FEDERAL IRRIGATION PROJECT		
Little Wind Unit:		
Ray Canal	8,242	38,303
Coolidge Canal	6,173	26,815
Sub Agency Canal	2,993	13,901
Subtotal	17,408	79,019
Upper Wind Unit:		
Wind River "A" Canal	972	9,555
Dinwoody Canal	5,759	54,235
Subtotal	6,731	63,790
Johnstown Unit:	603	3,461
Lefthand Unit:	1,205	7,267
MIDVALE IRRIGATION DISTRICT:	748	3,627
RIVERTON-LECLAIR IRRIGATION DISTRICT	1,065	5,112
PROJECT LANDS SUBTOTAL	27,760	162,276
NON-PROJECT LANDS—HISTORIC (including awarded Indian-owned fee lands)		
WIND RIVER BASIN		
East Fork Wind River	10	42
Dinwoody Creek	148	704
Sand Draw	0	0
Dry Creek	69	332
Bull Lake Creek	33	159
Meadow Creek	333	1,540
Dry Pasup Creek	82	365

Description/Source	Awarded Measure In Acres	Awarded Annual Diversion In Acre-Feet
Crow Creek	73	339
Willow Creek	0	0
Main Stem Wind River	1,091	5,330
Subtotal	1,839	8,811
PROJECT LANDS—HISTORIC		
LITTLE WIND RIVER BASIN		
North Fork Little Wind River	1,656	7,555
South Fork Little Wind River	625	2,792
Main Stem Little Wind River	1,085	5,632
Mil Creek	1	5
Sage Creek	1,644	8,064
Crooked Creek	69	317
Trout Creek	228	1,085
Spring Creek	178	769
Bighorn Draw	139	603
Subtotal	5,625	26,822
BIG HORN RIVER BASIN		
Main Stem Bighorn River	11	58
Cottonwood Creek	162	834
Fivemile Creek	267	1,293
Muddy Creek	1,025	5,024
Dry Muddy Creek	0	0
Maverick Springs Draw	0	0
Roundup or Warm Springs	0	0
Subtotal	1,465	7,209
POPO AGIE RIVER BASIN		
North Fork Popo Agie River	265	1,251
Main Stem Popo Agie River	36	180
Subtotal	301	1,431

Description/Source	Awarded Measure In Acres	Awarded Annual Diversion In Acre-Feet
OWL CREEK BASIN		
South Fork Owl Creek	278	1,015
Main Stem Owl Creek	0	0
Mud Creek	7	33
Red Creek	9	44
Subtotal	294	1,092
NON-PROJECT LANDS SUBTOTAL	9,524	45,365
PROJECT LANDS SUBTOTAL	27,760	162,276
TOTAL HISTORIC PROJECT AND NON-PROJECT LANDS	37,284	207,641

2. The United States has reserved, by virtue of the Treaty of Fort Bridger, July 3, 1868, and for the benefit of the Shoshone and Arapahoe Tribes of the Wind River Reservation, the right to divert water, or to have water diverted, in the amounts set forth herein, for the five awarded future projects. The said right has a priority date of July 3, 1868.

Future Projects	Awarded Measure In Acres	Awarded Annual Diversion In Acre-Feet
North Crowheart	34,993	133,324
South Crowheart	4,238	18,181
Arapahoe	3,437	15,088
Riverton East	3,019	13,890
Big Horn Flats	2,410	6,507
TOTAL FUTURE PROJECTS	48,097	186,990

3. In addition to the rights set out in paragraphs (1) and (2) above, the United States has reserved, by virtue of the Treaty of Fort Bridger, July 3, 1868, and for the

benefit of the Shoshone and Arapahoe Tribes of the Wind River Indian Reservation, the right to divert water, or to have water diverted, in the amounts set forth herein.

The priority dates shall be the earlier: When the land left Indian ownership and was purchased by a non-Indian or, the date of the applicable state water permit or, the date of first application of water for beneficial use.

Shown below are priority dates representing the dates stipulated by the parties as the earlier of the date when reacquired land left Indian ownership and was purchased by a non-Indian or the date of an applicable state water permit for that land.

In the event a determination needs to be made based on a date of earlier beneficial use, the parties may submit evidence as to beneficial use at a later stage in the case when other claims of this nature will be considered by the Court and pursuant to the direction of the Court.

Description/Source	Priority Date	Awarded Measure In Acres	Awarded Annual Diversion In Acre-Feet
PROJECT LANDS—HISTORIC (including awarded Indian-owned fee lands)			
WIND RIVER FEDERAL IRRIGATION PROJECT:			
Little Wind Unit:			
Ray Canal	03/18/1905	931	4,352
	04/19/1918	3	14
	05/19/1919	17	80
	01/28/1955	11	54
	02/12/1969	8	38
	10/14/1969	50	239
Subtotal		1,020	4,777
Coolidge Canal	03/18/1905	506	2,350
	07/11/1910	71	305
	01/20/1920	80	346
	05/15/1924	63	274
Subtotal		720	3,275

Description/Source	Priority Date	Awarded Measure In Acres	Awarded Annual Diversion In Acre-Feet
Sub Agency Canal	05/05/1905	52	243
Little Wind Unit Total		1,792	8,295
Upper Wind Unit:			
Wind River "A"	04/27/1905	205	1,128
Dinwoody Canal	04/27/1905	1,260	8,485
	04/24/1911	6	63
	10/05/1916	10	106
	03/30/1917	7	69
	08/25/1917	4	38
	01/12/1924	37	161
	07/22/1968	45	196
Subtotal		1,369	9,118
UPPER WIND UNIT TOTAL		1,574	10,246
Johnstown Unit:	02/18/1914	65	380
Lefthand Unit:	————	0	0
MIDVALE IRRIGATION DISTRICT:	08/07/1906	1,197	5,684
	07/16/1908	8	40
	06/26/1913	1	5
	08/18/1922	3	14
	11/18/1943	42	198
	01/29/1946	68	324
	03/17/1960	11	52
Subtotal		1,330	6,317
RIVERTON/LE CLAIR IRRIGATION DISTRICT:	08/07/1906	240	1,140
Crow Creek	04/27/1905	56	260
	08/11/1906	8	37
	09/20/1906	23	107
	09/27/1906	100	465
	10/27/1906	84	391

Description/Source	Priority Date	Awarded Measure In Acres	Awarded Annual Diversion In Acre-Feet
	11/19/1906	91	423
	06/24/1907	200	930
	07/05/1907	69	318
	11/23/1907	117	544
	02/15/1908	102	474
	06/18/1908	10	47
	06/26/1908	13	60
	07/27/1908	36	167
	02/01/1909	93	433
	05/20/1909	84	388
	06/10/1909	58	270
	07/12/1909	49	228
	09/17/1909	13	60
	08/01/1910	1	5
	08/26/1910	34	158
	10/13/1910	20	93
	12/15/1910	36	169
	03/06/1911	125	581
	03/30/1911	67	312
	04/17/1911	136	632
	05/01/1911	27	126
	06/05/1911	23	108
	07/15/1911	58	270
	06/06/1912	10	47
	07/25/1912	58	270
	11/01/1912	160	745
	12/14/1912	25	116
	12/19/1912	163	759
	01/14/1913	8	37
	01/15/1913	21	96
	03/05/1913	27	126
	11/15/1913	83	386
	03/20/1914	2	9
	07/14/1914	29	132
	09/16/1914	19	87
	11/20/1914	12	58
	02/17/1915	60	280
	04/18/1916	10	46
	02/09/1917	17	79
	04/14/1917	2	10
Subtotal		2,439	11,339
Willow Creek	10/19/1912	9	44
	11/08/1926	49	239
Subtotal		58	283

Description/Source	Priority Date	Awarded Measure In Acres	Awarded Annual Diversion In Acre-Feet
Main Stem Wind River	04/27/1905	278	1,327
	05/05/1905	156	741
	06/18/1908	84	421
	06/22/1908	99	480
	05/17/1909	77	366
	07/23/1910	58	278
	03/29/1911	18	86
	08/16/1912	157	762
	02/04/1913	2	10
	06/26/1913	129	620
	10/27/1916	43	209
	03/30/1917	6	30
	03/29/1918	29	138
	07/18/1918	28	136
	06/25/1923	32	155
	11/20/1923	10	48
	02/25/1928	9	45
	07/18/1929	1	4
	08/17/1929	71	344
	12/01/1937	23	109
Subtotal		1,310	6,309
Wind River Basin Total		5,645	26,476
LITTLE WIND RIVER BASIN			
North Fork Little Wind River	05/05/1905	478	2,290
	11/27/1914	7	29
	04/17/1918	20	90
	11/13/1919	7	31
Subtotal		512	2,440
South Fork Little Wind River	05/05/1905	240	1,075
Main Stem Little Wind River	11/27/1914	9	47
	07/18/1919	1	5
Subtotal		10	52

Description/Source	Priority Date	Awarded Measure In Acres	Awarded Annual Diversion In Acre-Feet
PROJECT LANDS SUBTOTAL		5,001	26,378
NON-PROJECT LANDS— HISTORIC (including awarded Indian-owned fee lands)			
WIND RIVER BASIN:			
East Fork Wind River	06/10/1908	22	97
Dinwoody Creek	————	0	0
Sand Draw	————	0	0
Dry Creek	————	0	0
Bull Lake Creek	06/18/1919	30	140
Meadow Creek	04/27/1905	160	760
	03/30/1917	40	193
	04/17/1918	19	92
	03/28/1919	18	85
	10/28/1929	7	35
Subtotal		244	1,165
Dry Pasup Creek	10/15/1906	29	135
	12/07/1906	57	264
	08/16/1907	21	97
	05/27/1907	115	534
	07/06/1908	146	677
	01/17/1908	58	269
	04/15/1909	169	784
	10/04/1909	40	180
	04/02/1910	77	357
	11/21/1910	140	650
	01/11/1911	16	74

Description/Source	Priority Date	Awarded Measure In Acres	Awarded Annual Diversion In Acre-Feet
	03/30/1911	14	65
	05/11/1912	8	35
	08/12/1912	31	142
	12/13/1912	75	348
	12/19/1912	33	150
	11/14/1913	5	26
	01/24/1914	153	710
	02/19/1914	49	227
	04/16/1917	83	385
	06/22/1917	9	42
	09/27/1917	11	51
	08/14/1917	118	547
	06/12/1919	85	394
Subtotal		1,542	7,143
Mill Creek	06/21/1912	27	131
Sage Creek	08/16/1912	78	378
	04/09/1917	63	306
	08/29/1921	12	63
	05/14/1923	1	3
Subtotal		154	630
Crooked Creek	————	0	0
Trout Creek	————	0	0
Spring Creek	————	0	0
Bighorn Draw	————	0	0
Little Wind River Basin Total		943	4,328
BIG HORN RIVER BASIN			
Main Stem Big Horn River	06/18/1908	15	78
	02/08/1909	28	145
Subtotal		43	223
Cottonwood Creek	08/11/1906	40	206
	10/08/1906	57	295
	01/28/1907	22	113

Description/Source	Priority Date	Awarded Measure In Acres	Awarded Annual Diversion In Acre-Feet
	03/02/1907	13	67
	04/29/1907	9	46
	09/06/1907	39	201
	06/18/1908	43	225
	07/16/1908	42	215
	10/05/1908	12	64
	03/01/1909	10	52
	03/21/1910	104	535
	05/01/1912	58	299
	12/13/1912	36	184
	12/17/1915	22	133
	08/16/1918	14	71
	03/16/1925	6	31
Subtotal		527	2,737
Fivemile Creek	12/19/1912	156	761
Muddy Creek	01/01/1884	87	413
	11/22/1905	49	234
	08/13/1906	45	214
	10/04/1906	85	404
	12/14/1906	43	214
	03/02/1907	105	499
	03/16/1907	10	47
	05/01/1907	75	359
	08/01/1907	107	509
	09/06/1907	86	408
	01/13/1908	63	299
	01/17/1908	26	124
	07/16/1908	9	44
	07/20/1908	149	708
	08/31/1908	18	85
	12/05/1908	38	181
	02/03/1909	51	240
	03/01/1909	34	163
	11/04/1909	3	13
	11/26/1909	87	413
	12/20/1909	4	20
	04/19/1910	147	698
	05/26/1910	7	33
	09/16/1910	167	793
	10/06/1910	7	33
	03/14/1912	24	114
	03/18/1912	9	44
	12/13/1912	29	138

Description/Source	Priority Date	Awarded Measure In Acres	Awarded Annual Diversion In Acre-Feet
	12/19/1912	290	1,377
	01/15/1913	7	36
	02/05/1913	87	413
	06/11/1913	1	4
	09/09/1913	61	290
	03/07/1914	100	475
	03/18/1915	40	190
	04/24/1915	12	57
	04/19/1916	29	138
	01/31/1919	5	25
	08/27/1921	32	158
	12/03/1924	28	133
	07/29/1930	12	57
Subtotal		2,268	10,797
Dry Muddy Creek	———	0	0
Maverick Springs Draw	———	0	0
Roundup or Warm Springs	08/11/1906	35	153
Big Horn River Basin Total		3,029	14,671
POPO AGIE RIVER BASIN			
North Fork Popo Agie River	01/05/1915	95	449
	01/23/1920	33	155
	04/07/1924	67	316
	04/17/1924	21	101
	11/02/1932	12	60
Subtotal		228	1,081
Main Stem Popo Agie River	08/11/1906	33	157
	08/26/1915	1	8
Subtotal		34	165

Description/Source	Priority Date	Awarded Measure In Acres	Awarded Annual Diversion In Acre-Feet
Popo Agie River Basin Total		262	1,246
OWL CREEK BASIN			
South Fork Owl Creek	07/16/1908	26	124
	08/19/1908	117	558
	10/05/1908	18	89
	05/10/1909	21	101
	10/02/1909	80	382
	09/12/1910	63	301
	01/16/1911	8	37
	03/27/1911	8	39
	05/22/1911	3	16
	11/07/1924	29	142
	01/14/1926	14	67
Subtotal		387	1,856
Main Stem Owl Creek	08/22/1907	246	1,168
	06/18/1908	142	672
	08/19/1908	19	90
	05/08/1909	116	551
	10/02/1909	211	994
Subtotal		734	3,475
Mud Creek	11/22/1905	87	413
	07/10/1908	58	275
	07/18/1908	61	290
	01/01/1909	7	35
	06/10/1909	135	641
	07/25/1910	65	309
	09/29/1913	18	86
	07/11/1912	136	646
	07/22/1912	4	19
	11/14/1916	27	130
	02/02/1918	64	302
	01/15/1919	28	133
	07/30/1919	9	42
	08/10/1924	2	13
	08/16/1924	57	269
Subtotal		759	3,603
Red Creek	11/22/1905	83	394
	12/15/1907	11	51

Description/Source	Priority Date	Awarded Measure In Acres	Awarded Annual Diversion In Acre-Feet
	12/16/1907	56	268
	08/16/1908	22	103
Subtotal		172	816
Owl Creek Basin Total		2,052	9,750
NON PROJECT LANDS SUBTOTAL		11,931	56,471
PROJECT LANDS SUBTOTAL		5,001	26,378
TOTAL HISTORIC PROJECT AND NON-PROJECT LANDS		16,932	82,849
FUTURE PROJECTS			
RIVERTON EAST	07/02/1910	423.0	1,947.0
FUTURE PROJECT TOTALS		423.0	1,947.0

4. The sole purpose behind the creation of the Wind River Indian Reservation was agricultural, which included related uses, domestic and livestock.

5. A reservation reserved water right does not exist in favor of the United States nor Tribes for the purpose of any of the following uses: industrial, mineral, municipal, fisheries, wildlife or aesthetics.

6. Neither the United States nor the Tribes are entitled to a reservation reserved water right for those lands outside of the stipulated boundaries of the Wind River Indian Reservation, known as the Arapahoe Ranch and the Padlock Ranch, that have been purchased and are held in trust by the United States for the Shoshone and Arapahoe Indians.

7. Neither the United States nor Tribes have a reservation reserved water right to groundwater.

8. The Tribes are entitled to make such use of the water covered by their reserved water rights they deem advisable but the use is confined to the reservation and in no event shall the consumptive use be increased.

9. The Tribes can sell or lease any part of the water covered by their reserved water rights but the said sale or lease cannot be for exportation off of the reservation and in no event shall the consumptive use be increased.

10. The Tribes are entitled to continue the use of such amounts of groundwater which they are now using, and which are not covered by reserved rights, but only so long as the present uses are continued, unless approval is obtained from the State Engineer's Office, and in no event shall the consumptive use be increased.

11. All State water permits which have later priority dates than the Court awarded reserved water right dates and which cover the same tracts of land are hereby cancelled.

12. The water rights under this Decree shall in the first instance be administered by the Wyoming State Engineer in accordance with the terms set forth herein. Prior to seeking judicial enforcement of any right under this Decree, the United States shall first request the State Engineer to exercise his administrative authority.

13. The United States and Tribes shall install or cause to be installed such measuring devices for all water rights decreed herein as may be reasonably required by the State Engineer to administer such rights adequately in the same manner and to the same effect as may be required in the future of or imposed on any other water user under Wyoming law.

14. Pursuant to W.R.C.P. 54(b), the Court finds that there is no just reason for delay for entry of final judg-

ment on the claims described herein, and therefore, ORDERS same.

Dated this 15th day of May, 1985.

/s/ Alan B. Johnson
ALAN B. JOHNSON
District Judge

[Certificate Omitted in Printing]

APPENDIX E

IN THE DISTRICT COURT FOR THE
FIRST JUDICIAL DISTRICT
STATE OF WYOMING, COUNTY OF LARAMIE

Docket No. 101-234

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE BIG HORN RIVER SYSTEM AND ALL OTHER SOURCES, STATE OF WYOMING.

[Filed June 8, 1984]

ORDER RULING ON MOTIONS TO ALTER OR AMEND THE DECISION OF MAY 10, 1983

THE ABOVE CAPTIONED MATTER has come before the Court for resolution of the following motions made after entry of the Decision and Judgment and Decree of May 10, 1983:

(a) Motion to Amend Findings of Fact and Judgment and Decree, filed by the State of Wyoming through its Attorney General;

(b) The United States' motion to alter or amend the Court's May 10, 1983, Judgment, filed by Department of Justice, Land and Natural Resources Division;

(c) Motion to Alter or Amend Judgment, filed by the Arapahoe and Shoshone tribes of the Wind River Indian Reservation, through their attorneys.

Hearings were conducted on July 14, 1983, and November 15, 1983, in the Courtroom, The County Building, Cheyenne, Wyoming. Appearing and participating for the various parties to the motions were:

(a) Michael D. White, Nossaman, Kreuger, and Marsh, Denver, Colorado, Special Assistant Attorney General, State of Wyoming, and Randall T. Cox, Assistant Attorney General, State of Wyoming, representing the State;

(b) James J. Clear, Attorney, Indian Resources Section, Department of Justice and Joseph Membrino, Attorney, Office of the Solicitor, Department of Interior, both from Washington, D.C., representing the United States;

(c) Robert S. Pelcyger, Attorney at Law, Fredericks and Pelcyger, Boulder, Colorado, and William J. Thomson, Attorney at Law, Dray, Madison, and Thomson, Cheyenne, Wyoming, counsel for the Arapahoe Tribe;

(d) Harry Sachse and William R. Perry, Attorneys at Law, Sonosky; Chambers, Sachse and Guido, Washington, D.C.; and William J. Thomson, Attorney at Law, Dray, Madison and Thomson, Cheyenne, Wyoming, counsel for the Shoshone tribe.

At the hearing on July 14, 1983, the briefs submitted in support of each party's motions were considered by the Court as were oral arguments on behalf of each party's contentions. On August 2, 1983, the Court entered its Order Regarding Reacquired Lands and Setting a Hearing which had the effect of striking paragraph 14 of the Judgment and Decree of May 10, 1983, relieving the parties of the pressure to proceed with appeals and directing the parties to prepare a Joint Statement identifying tracts of land reacquired by the Tribes or by the United States in trust or by individual Indians in fee,

the date each tract first left Indian ownership, the date of any state water permit or water certificate for each tract, and the reacquisition date.

On November 15, 1983, the parties appeared before the Court for further hearing on matters related to the above motions, but specifically devoted to issues surrounding lands which had been transferred by or on behalf of Indians to non-Indians and which were later reacquired by the Tribes or by individual Indians in fee. A number of stipulations by and between the parties were presented to the Court.

(a) A stipulation was presented to the Court that the Judgment and Decree of May 10, 1983, be amended to identify and correct lands erroneously included in the quanification of Indian reserved water rights. The Court entered its Order granting amendment to the judgment and decree, approving the stipulation and amending the decree.

(b) A stipulation of fact with Exhibits A and B was received as part of the record, which set out reacquired trust land within the classification of historic tracts as practicably irrigable (Exhibit A) and reacquired trust land within the classification of future projects (Exhibit B).

(c) A stipulation of fact with Exhibit C was received as a part of the record, which describes and lists all Indian owned fee tracts (except Tracts 16, 44, and portions of Tracts 90 and 119) awarded in the decision of May 10, 1983.

(d) A stipulation of fact with Exhibit D describing disputed tracts, which the State contends should be deleted from consideration in the calculation of the reserved water rights.

(e) A stipulation of corrections (Exhibit E) to be made by the Court to paragraph 1 of the Judg-

ment and Decree of May 10, 1983, without further evidence being received by the Court.

The Court then heard testimony in the form of offers of proof from Mr. James D. Voeller, Mr. Craig L. Sommers, and Mr. Ronald Billstein, who testified as to reacquired land, which remains in dispute.

The Court has reviewed the arguments, the memoranda, the stipulations of fact, and the offers of proof, and it finds and discusses the various elements of the motions filed by the parties in the following paragraphs.

STATE OF WYOMING MOTION TO AMEND PARAGRAPH 3 OF THE JUDGMENT AND DECREE: a. TO MAKE A DETERMINATION OF SEVERAL UNRESOLVED ISSUES WHICH, UNTIL THEY ARE DETERMINED WITH FINALITY, PRECLUDE APPEAL OF THE FINAL ORDER PURSUANT TO RULE 54(b) W.R.C.P.

The parties have submitted stipulations of fact accompanied by exhibits described above, which resolve issues related to the calculation of reacquired lands from non-Indian owners. The stipulations received by the Court make further action by it unnecessary.

STATE OF WYOMING MOTION TO AMEND PARAGRAPH 3 OF THE JUDGMENT AND DECREE: b. TO PROVIDE THAT THE PRIORITY DATES FOR REACQUIRED LANDS ARE THOSE DATES WHEN EACH TRACT WAS REACQUIRED.

After consideration of the arguments submitted by the parties, the Court will affirm the decision of Judge Joffe, holding that the priority date of reacquired acreage owned by Indians in fee or by the United States in trust for the Tribes shall be the earlier of two dates: the date of the applicable state water permit or the date land left Indian ownership and was purchased by a non-Indian.

The date of the applicable state water permit shall be the date as identified as "water right date" set out in Exhibits A, B, C, and D, entered into the record on November 15, 1983, and to which the major parties have stipulated.

STATE OF WYOMING MOTION TO DELETE THE LANGUAGE IN THE JUDGMENT AND DECREE ADOPTING THE SPECIAL MASTER'S REPORT.

The Special Master's Report, written after months of trial, is the cornerstone of the case. The Court approved and adopted the Special Master's Report, except where it is inconsistent with the Judgment and Decree. It is hardly surprising that differences have arisen as to the conclusions to be drawn from the facts in a case of this magnitude.

STATE OF WYOMING MOTION TO CLARIFY THE DECREE BY PROVIDING THAT DIVERSIONS OF WATER FOR DOMESTIC AND LIVESTOCK WATERING USES ARE INCLUDED AND SUBSUMED IN THE DIVERSIONS AWARDED IN PARAGRAPHS 1 AND 2 OF THE JUDGMENT AND DECREE.

Paragraph 4 of the Judgment and Decree states that "the sole purpose behind the creation of the Wind River Indian Reservation was agricultural, which included related uses, domestic and livestock." The Court considers the wording to be clear.

STATE OF WYOMING MOTION TO MODIFY THE JUDGMENT AND DECREE TO CORRECT FOR ARITHMETIC ERRORS IN CALCULATING THE NUMBER OF PRACTICABLY IRRIGABLE ACRES.

The stipulation of the parties correcting the Court's determination of practicably irrigable acres is approved and accepted as contained in Exhibit E, entered herein on November 15, 1983. Paragraph 1 of the Judgment and Decree should be amended to reflect the corrections

and a copy of the Stipulation and Exhibit E is attached to this decision and is incorporated into it.

STATE OF WYOMING MOTION TO MODIFY THE DECREE TO MAKE IT CONSISTENT WITH EXPRESS RULINGS OF THE COURT BY DELETING RESERVED WATER RIGHTS INADVERTENTLY AWARDED TO . . . LANDS OUTSIDE THE STIPULATED BOUNDARIES OF THE WIND RIVER INDIAN RESERVATION.

A Stipulation dated November 15, 1983, signed by the attorneys for the major parties and C. Edward Webster II, attorney for various water uses in the Owl Creek Drainage and in Hot Springs County, Wyoming, which identified tracts of land and corresponding grant of reserved water rights for said lands, reduced the amount of water right granted because the tracts lie outside of the stipulated boundaries of the Wind River Indian Reservation, and for which a reserved water right was erroneously awarded.

By a previous order the Court accepted the stipulation and ordered that the May 10, 1983, Judgment and Decree be amended so that paragraph 1 from the heading "Owl Creek Basin" on page 68 of the Judgment and Decree to the conclusion of that paragraph shall read:

OWL CREEK BASIN

South Fork Owl Creek	898	3,976
Main Stem Owl Creek	674	3,196
Mud Creek	766	3,620
Red Creek	0	0
Subtotal	2,338	10,792
NON-PROJECT LANDS SUBTOTAL	25,132	118,386
PROJECT LANDS SUBTOTAL	27,762	162,911
TOTAL HISTORIC PROJECT LANDS AND NON-PROJECT LANDS	52,894	281,297

STATE OF WYOMING MOTION TO MODIFY THE DECREE TO MAKE IT CONSISTENT WITH THE COURT'S EXPRESS RULINGS BY DELETING RESERVED WATER RIGHTS INADVERTENTLY AWARDED TO LANDS OWNED BY NON-INDIANS.

The State of Wyoming has presented testimony that in collecting and preparing information contained in the Stipulations of Fact received by the Court on November 15, 1983, pertaining to reacquired acreage, the State discovered new evidence as to alleged ownership by non-Indians of certain tracts of land. These tracts may be identified by reference to Exhibits D and F, submitted to the Court on November 15, 1983. The testimony produced by the State and by the United States was submitted under an offer of proof.

The Court has considered this matter and is of the opinion that it would not be beneficial to reopen the case to receive further evidence. The evidence has not been examined by opposing parties and to receive it would serve no purpose. Further, the State has not demonstrated to the Court that this evidence was not reasonably discoverable and subject to production at trial. W.R.C.P. 59(a)(7). Accordingly, the Court will not receive as evidence the testimony reflected in the offers of proof and exhibits tendered to the Court during the presentation of those offers.

STATE OF WYOMING MOTION TO CLARIFY THE LIMITATIONS CONTAINED WITHIN THE JUDGMENT AND DECREE UPON OFF-RESERVATION USE OF RESERVED WATER RIGHTS BY DEFINING THE TERM "RESERVATION" TO INCLUDE ONLY TRUST LANDS AND INDIAN-OWNED FEE LANDS.

The Court is of the opinion that the Judgment and Decree does not require further clarification and that ample evidence appears in the record to support the findings of the Special Master and the Court.

STATE OF WYOMING MOTION TO MODIFY WATER DUTIES SO THAT THEY ARE ACTUALLY BASED ON 40% EFFICIENCY, AS BOTH THE MASTER AND COURT INTENDED THAT THEY SHOULD BE.

Testimony was given that the historic efficiency of irrigators in Water Division No. 3 averages 35%. This figure varies due to variances in terrain, soil composition, irrigation systems and water management. The State argued for the imposition of an irrigation efficiency requirement of 50%. Floyd Bishop, former Wyoming State Engineer, testified for the State that in his opinion a 50% efficiency rate is achievable. However, he named no area in all of Wyoming where a 50% efficiency ratio has been achieved. (Page 138, Master's Report).

The Special Master concluded, on page 181, that "it would be unreasonable and inequitable to impose a duty on the Indians which is far in excess of what is currently expected of other water users in Water Division No. 3." He said, on page 139, "I also find that an increase of 5% in the overall irrigation efficiency (to 40%) the historic lands would not be unreasonable or overly burdensome to the irrigators here, in light of all the evidence."

This overall efficiency percentage reflects the Master's finding that there are areas within Water Division No. 3 where an actual efficiency requirement of 40% would be harsh, and he has allowed some room for flexibility, but his figures do reflect an *overall* efficiency of 40%. Therefore, to grant the motion of the State of Wyoming would be to impose a burden on Indian water users which was not the intention of either the Master or the Court.

STATE OF WYOMING MOTION TO DELETE THE PROVISION FOR CONTINUED USE OF SURFACE WATER IN PARAGRAPH 10 OF THE JUDGMENT AND DECREE.

The Court has determined, after reviewing the record in this case, that there is no current use by the Tribes of surface water which is not encompassed by the reserved water right determination by the Court. The motion of the State should be granted and the words, "surface and" should be deleted from paragraph 10 of the Judgment and Decree of May 10, 1983.

THE ARAPAHOE AND SHOSHONE TRIBES' MOTION TO INCLUDE IN-STREAM FLOWS FOR FISHERY PURPOSES IN THE JUDGMENT AND DECREE.

The Tribes seek amendment of the Judgment and Decree to reserve water for "in-stream flows for preservation of optimum fish habitat." Judge Joffe applied a stricter interpretation of the implied reserved water right doctrine than that applied by Special Master Roncalio. The Judge determined that the Treaty of Fort Bridger had as its purpose the establishment of an agricultural reservation. This sole purpose provided the basis upon which the reserved right of the Tribes could be quantified. Clearly, the Court differed from the Special Master in its interpretation of the purpose of the reservation, but also as to the ultimate facts relating to the fish habitat issue. The Judge distinguished on their facts the cases relied upon by both the master and the Tribes in support of a minimum in-stream flow. *Menominee Tribe v. United States*, 391 U.S. 404 (1968) and *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir., 1981). The Judge rejected the claim in this case that the sale of recreational fishing licenses to members of the public by the Tribes represents a significant factor related to the Indians' lifestyle. From an historical perspective, the

Court determined that the Tribes failed to show that fishing has been significant. Correctly, the Judge noted that the Tribes here are not involved in commercial fishing. To describe the activity of the Tribes as maintaining fisheries is misleading; rather the drainage discussed in this case as one of its aspects is a fish habitat within and without reservation boundaries.

The Tribes rely upon *U.S. v. Shoshone Tribe*, 304 U.S. 110, 116, 82 L.Ed. 1213, 1218, and contending that the Court's decision as to the purpose of the reservation as set forth in the treaty should dictate an implied reserve water right for minimum in-stream flows for fish habitat. *Shoshone Tribe* is a case that interprets the treaty in light of compensation for a taking of the Shoshone Tribe's property rights by the United States. The opinion held that the United States retained no beneficial interest in the timber or lands that were made part of the reservation to the Shoshone Tribe. As noted at 82 L.Ed. 1219, the treaty provides:

> "• • • plainly evidence purpose on the part of the United States to help create an independent permanent farming community upon the reservation."

The reserved water right quantified by Judge Joffe does not deny the Tribes the ability to regulate in-stream flows in order to maintain what may be considered necessary water for optimum fish habitat, nor does the opinion limit any such power that may exist on the part of the Tribes. The Tribes may seek to dedicate their stream flows for fish habitat by using water reserved to them by the decision.

THE ARAPAHOE AND SHOSHONE TRIBES' MOTION TO ELIMINATE THE STORAGE CONDITION IN PARAGRAPH 2 OF THE JUDGMENT AND DECREE.

In tihs case, the standard of measurement used by the Special Master and the Court to determine the present

and future needs of the Tribes, as promulgated by the United States Supreme Court in *Arizona v. California*, 373 U.S. 546 (1963), is practicably irrigable acreage. To develop the presentation of evidence in a logical way, the parties divided the claims for water in this case into two categories: the water for lands now and historically irrigated, called the "historic" acreage, and waters for lands not now irrigated, but which would qualify now or in the future as practicably irrigable acres, called the "future" acreage.

The ramifications of the granting of a reserved water right for these two categories are that the reserved water right award for "historic lands" preserved the status quo of water use in the Big Horn Basin, but that the grant, and immediate use of the water award for "future acreage" would give the Tribes an 1868 priority date for water to which they previously had not used nor claimed. This is the issue which has caused so much uncertainty and emotional reaction in this case: Will the reserved water right award, allowing full use by the Tribes of water granted for future acreage without imposing some kind of storage condition impose an impossible burden on other water users?

The Tribes, in their motion to amend the District Court's Decree, which limits the exercise of the right to use 188,937 acre feet of water per year to irrigate "future lands," argue that the Court-imposed condition has the effect of negating their water right, undermines it, and is inconsistent with the 1868 priority to which the Tribes are entitled by virtue of the Court's ruling.

The Special Master and Judge Joffe struggled with the problem of the possible effects of the immediate use of the water allocated for future needs on the other water users in the Basin. There was some testimony presented in the case that allowing full use of the water granted for future acreage without imposing some kind of storage condition would impose a great burden on other wa-

ter users. Both men were influenced by the admonitions of Justice Powell of the United States Supreme Court in *United States v. New Mexico*, 438 U.S. 696, 57 L.Ed.2d 1052, 1068, who said:

> "I agree with the court that the implied-reservation doctrine should be applied with sensitivity to its impact upon those who have obtained water rights under state law and to Congress's general policy of deference to state water law." (Citations omitted.)

Both Judge Joffe and Special Master Roncalio concluded, in the absence of any Supreme Court cases to give guidance, that the circumstances of the case dictated a judicially-imposed limitation on the exercise of the reserved right award as it applies to future needs.

Judge Joffe based his argument to limit the reserved right for future projects on the doctrine of equitable estoppel. However, he did not discuss the element of affirmative misconduct, which appears to apply to the application of the doctrine of equitable estoppel against the United States. I am of the opinion that a finding of affirmative misconduct is an essential element in order to create an estoppel against the United States. *Schweiker v. Hansen*, 450 U.S. 785, 788-89 (1981) (per curiam); *INS v. Hibi*, 414 U.S. 5, 8-9 (1973) (per curiam); *United States v. Harvey*, 661 F.2d 767, 775 (9th Cir. 1981, *Cert.Den.*) 1035 S.Ct. 74, *Lavin v. Marsh*, 644 F.2d 1387, 1382 (9th Cir. 1981); *United States v. Ruby Co.*, 588 F.2d 697 (9th Cir. 1978). In *Lavin v. Marsh*, supra, the proposition was established that silence, acquiescence or even negligence will not constitute affirmative misconduct for the purposes of establishing that element for equitable estoppel against the United States. *United States v. Nez Perce County, Idaho*, 553 F. Supp., 187, 192-93 (D. Ida. 1982).

I can find no evidence in the record to support a finding of affirmative misconduct by the Federal Government

in the development of the Wind River Indian Reservation to support the limitation on the Tribe's right to "future water" as set out in paragraph 2 of the Decree.

However, this is not to say that the implied-reserved-water-doctrine may not be applied with limitations and restrictions. Mr. Justice Rehnquist most aptly observed in *United States v. New Mexico*, 57 L.Ed.2d at 1056:

> "In arid parts of the West, however, claims to water for use on federal reservations inescapably vie with other public and private claims for the limited quantities to be found in the rivers and streams. This competition is compounded by the sheer quantity of reserved lands in the Western States, which lands form brightly colored swaths across the maps of these States."

What complex factual situation is more illustrative of the competing pressures for water and upon the doctrine of implied-reserved-water-rights than this case?

However, the definition of what "bundle" of rights may be encompassed within the term implied-reserved-water-doctrine, and what restricts or limitations may be imposed its exercise is not at all clear.

> "While many of the contours of what has come to be called the 'implied-reservation-water-doctrine' remain unspecified, the Court has repeatedly emphasized that Congress reserved 'only that amount of water necessary to fill the purpose of the reservation, no more.' *Cappaert*, supra, at 141, 48 L.Ed.2d 523, 96 S.Ct. 2062. See *Arizona v. California*, supra, at 600-601, 10 L.Ed.2d 542, 883 S.Ct. 1468; *District Court for Eagle County*, supra, at 523, 28 L.Ed.2d 278, 91, S.Ct. 998. Each time this Court has applied the 'implied-reservation-of-water doctrine,' it has

> carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated."

By interpreting the purpose of the reservation, the Court in a real sense defines and expresses the limitations of the implied reservation of water.

I am reluctant to change an essential part of the Judgment and Decree of May 10, 1983, because I understand the dilemma faced by Judge Joffe and by Special Master Roncalio in reaching their decisions. However, I can find no basis in the law for denying the Tribes the enjoyment of their vested right to 188,937 acre feet of water per year, identified as the water for "future lands." As in all the water granted in this case, these terms have been used for identification and measurement, but the tribes are not limited in the character of use of the water.

The Tribes are still bound by the strictures of paragraph 8 and 9 of the Decision limiting use of their water to the confinements of the reservation itself. This holding is consistent with other language of the decree, that the primary purpose of the reservation is agricultural and that the measurement of water for future as well as present needs of the reservation is ". . . enough water to irrigate all the practicably irrigable acres on the reservation." Establishment of the reservation as a homeland and development of it as such has been the controlling theme of these proceedings. Therefore paragraph 2 of the Judgment and Decree should be amended to read:

> 2. The United States has reserved, by virtue of the Treaty of Fort Bridger, July 3, 1868, and for the benefit of the Shoshone and Arapahoe Tribes of the Wind River Indian Reservation, the right to divert water, or to have water diverted, in the

amounts set forth herein and identified, but the use not limited to, the five future projects.

IT IS HEREBY ORDERED:

1. The motion of the State to amend paragraph 3 of the Judgment and Decree is denied in view of the stipulations and exhibits tendered by the parties to the Court, which in large measure resolve issues of lands reacquired by the United States, Tribes, and Indians, from non-Indian ownership.

2. The State's Motion to Amend Paragraph 3 of the Judgment and Decree to establish as priority dates for reacquired lands the date the land was reacquired, is denied in view of the express determination of the Court that the priority date shall be the earlier of the date of the applicable state water permit or the date land left Indian ownership and was purchased by a non-Indian. The date of the applicable state water permit shall be the date as identified as "water right date" in Exhibits A, B, C, and D to the Stipulations of Fact received by the Court on November 15, 1983.

3. The motion of the State to delete language in the Judgment and Decree adopting the Special Master's Report is denied.

4. The State's Motion to Further Clarify the Judgment and Decree by providing that diversions of water for domestic and livestock watering uses are included and subsumed in the diversions awarded in paragraphs 1 and 2 of the Judgment and Decree is denied for the reason that the Decree is clear and that such uses are included.

5. The Judgment and Decree is amended to reflect the corrections, which were the subject of a stipulation of fact by and between the parties hereto and which is reflected in Exhibit E to that Stipulation as received by the Court on November 15, 1983. Exhibit E is attached hereto and is incorporated into this Order.

6. The State's Motion to Modify the Decree to Correct the Decree to Eliminate the Granting of Implied Reserved Water Rights to Certain Lands Outside of the Stipulated Boundaries of the Wind River Indian Reservation has been previously granted pursuant to stipulation entered into by and between the concerned parties. Accordingly, the State's Motion having previously been granted, it will be the Court's determination that further action is unnecessary and that this matter is now moot.

7. The State's Motion to Modify the Judgment and Decree by reopening and taking evidence in this matter as to possible lands owned by non-Indians is denied.

8. The State's Motion to Clarify the Judgment and Decree upon off-reservation use of reserved water rights by defining the term "reservation" to include only trust lands and Indian-owned fee lands is denied.

9. The State's Motion to Modify Water Duties so that they are actually based on 40% efficiency should be denied for the reason that the State of Wyoming is asking the Court to make an assumption which is not supported by the record. It appears that the 40% efficiency determination was applied overall.

10. The State's Motion to Delete the provision for continued use of surface water in paragraph 10 of the Judgment and Decree is granted and the words "surface and" shall be and hereby are deleted from paragraph 10 of the Judgment and Decree of May 10, 1983.

11. The Motion of the Tribes to include an implied-reservation-of-water for minimum in-stream flows for fish habitat purposes in the Judgment and Decree is denied.

12. The Tribes' Motion to Eliminate the Storage Condition Imposed in Paragraph 2 of the Judgment and Decree of May 10, 1983, is granted. Paragraph 2 of the

Judgment and Decree shall be and hereby is, amended to read:

> 2. The United States has reserved, by virtue of the Treaty of Fort Bridger, July 3, 1868, and for the benefit of the Shoshone and Arapahoe tribes of the Wind River Reservation, the right to divert water, or to have water diverted, in the amounts set forth herein and identify, but the use not limited to, the five awarded future projects.

Dated this 8th day of June, 1984.

/s/ [Illegible] Johnson
Judge

APPENDIX F

IN THE DISTRICT COURT
OF THE FIFTH JUDICIAL DISTRICT
STATE OF WYOMING

Civil No. 4993

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE BIG HORN RIVER SYSTEM AND ALL OTHER SOURCES, STATE OF WYOMING.

Harold Joffe, District Judge

Decision

Concerning Reserved Water Right Claims
By and On Behalf of The
Tribes of the Wind River Indian
Reservation, Wyoming

May 10, 1983

IN THE DISTRICT COURT
OF THE FIFTH JUDICIAL DISTRICT
STATE OF WYOMING

Civil No. 4993

IN RE: IN GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE BIG HORN RIVER SYSTEM AND ALL OTHER SOURCES, STATE OF WYOMING.

Decision

For the purpose of this decision, the State of Wyoming will sometimes be referred to as "State of Wyoming" and "State", the United States of America will sometimes be referred to as "United States", and the Shoshone and Arapahoe Tribes of the Wind River Indian Reservation will sometimes be referred to as "Tribes." On occasion, a reference will be made to the "United States and the Tribes", and this term may refer solely to either the Tribes or the United States.

When the Court is referring to the Indian reserved water right which would have a priority date of 1868, the Court uses the phrase "reservation reserved right." When the Court uses the term "reserved right", the Court has reference to the reserved right in general, or a reserved right which has a priority date other than the 1868 reservation date.

Statement of the Case

The complaint in this case was filed by the State of Wyoming on January 24, 1977, in the District Court of

the Fifth Judicial District of Wyoming, in Washakie County, as a general adjudication to determine all the rights to use water in the Big Horn River System and all other sources in Water Division No. 3, State of Wyoming. The United States was named as defendant in its own right and on behalf of the Arapahoe and Shoshone Indian Tribes of the Wind River Reservation.

In response, the Department of Justice filed a petition for removal of the case from State Court to the United States District Court for the District of Wyoming. Federal Judge Ewing T. Kerr remanded the case to the State Court, concluding that the jurisdiction was properly in the Wyoming State Court. The United States then filed a motion to dismiss the complaint.

Following this, this Court ruled that the provisions of Section 1-1054.1 Wyoming Statutes provide for an adjudication of water rights within the meaning of the McCarran Amendment, and that the State Court has jurisdiction over the matter. The Court also determined that the Shoshone and Arapahoe Tribes are proper parties to the litigation. The United States and the Tribes preserved for appeal the issue of jurisdiction.

The case was assigned for hearing to a Special Master, Teno Roncalio, of Cheyenne, Wyoming, who separated the case for hearing into three parts, the Indian Claims, the non-Indian Claims and the uncancelled permits.

In this portion of the case, the Indian Claims, the United States has claimed reserved water rights for the Shoshone and Arapahoe Tribes of the Wind River Indian Reservation for agriculture, fisheries, wildlife and aesthetics, mineral development and domestic, municipal and industrial uses.

The Tribes endorse the claims made by the United States on their behalf, but find them insufficient, asserting that greater amounts of water are necessary to satisfy present and future needs of the Reservation.

The State of Wyoming denies that the United States and Tribes are entitled to the rights they claim on behalf of the Wind River Indian Reservation, citing a number of legal theories and facts. Wyoming contends than no reservation reserved water right was created on behalf of the Wind River Indian Reservation when the Reservation was created by Treaty on July 3, 1868, or that, if created, has since been abrogated or lost. Finally, even if the United States did intend to create reservation reserved rights on behalf of the Wind River Reservation when it created the reservation, Wyoming contends that the United States is now estopped from claiming those rights. If the Court finds that reserved rights were created and were never abrogated, Wyoming argues that all general limitations inherent in the reserved rights doctrine must apply to those rights.

Background of the Case

Wyoming's Big Horn River System (Water Division No. 3) consists of all lands within the state drained by the Big Horn River and its tributaries and by Clark's Fork and its tributaries. It is located in Fremont, Hot Springs, Washakie, Big Horn and Park counties in northwestern and west central Wyoming and includes parts of Yellowstone National Park. The Wind River Indian Reservation, which contains approximately 4000 square miles, is located in the southeastern portion of the region.

The area includes numerous mountain ranges and basins. Among the ranges are the Absaroka in the northwest, the Wind River in the south, the Owl Creek in the central area, and the Big Horn in the east. The two major basins are the Wind River in the southeast and the Big Horn in the northeast. The Wind River Indian Reservation occupies most of the Wind River Basin and is surrounded by the southeastern portion of the Wind River Range to the west and southwest and the Owl Creek Range to the north.

The topography of the area is varied. It includes mountain peaks and valleys, high plateaus, terraced stream valleys and low desert badlands. Elevations range from over 13,000 feet in the Wind River Range to 3,870 feet near a town called Basin. On the Reservation the elevation varies from 12,500 feet in the Wind River Range to 4,500 feet at the northeastern corner near the Wind River Canyon.

The primary drainage systems in the region are the Wind River/Big Horn River which originates in northern Fremont County and leaves the Division at the Wyoming/Montana border in northern Big Horn County; the Clark's Fork River which drains much of the northwestern portion of the region, originating and existing in northwestern Park County; and the Shoshone River, a major tributary of the Big Horn River which originates in northern Park County and joins the Big Horn at the Yellowtail Reservoir.

Because of the semi-arid nature of the region, all the settlements, Indian and non-Indian alike, were and are dependent on water for establishment and continuance. The social and economic life of the basin as a whole is directly dependent on water, with irrigated agriculture being the mainstay of human endeavor.

History of the Region

The history of the Big Horn Basin for purposes of this case begins in the early 1800's when explorers, trappers and traders began travelling into and through northwestern Wyoming, part of the vast hunting grounds of the peripatetic Shoshone Indians. Neither group encroached on the other and relations were friendly. However, as more non-Indians moved into the area, to preserve peace and stability, the United States reached an agreement in 1863 generally delineating the boundaries within which the Eastern Shoshone roamed, a 44,672,000

acre region comprising parts of Wyoming, Colorado and Utah.

Following the Civil War, as the westward movement gained momentum, the U.S. Government realized the size of the region set aside for Indians only was unrealistic, and on July 3, 1868, executed the Second Treaty of Fort Bridger with the Shoshone and Bannock Indians, establishing the Wind River Indian Reservation. In 1878, the Arapahoe Indians were placed on the Reservation. They settled in the southeast; the Shoshone had established their settlements in the western portion of the Reservation.

During their first years on the Reservation, the Shoshone Indians were still dependent on the buffalo as the mainstay of their life. However, as the supply rapidly decreased, they began a changeover to an agricultural economy. During the 1870's, the Shoshone Indians increased their efforts in both farming and ranching. By the 1880's and early 1890's, however, it was evident that the agricultural economy of the Indians was failing. By 1895, the Indians on the Wind River Indian Reservation were starving, desperate and totally dependent on the government for food, clothing and shelter. These economic misfortunes compelled them to sell some of their land in 1896 to the United States.

An additional 1,480,000 acres of Reservation land were sold in 1904/1905 to the Government in the Second McLaughlin Agreement. The revenue from the sale helped develop the remaining Reservation lands (which came to be known as the "diminished reservation"). The U.S. Government offered the ceded lands for sale to others, under the provisions of the homestead, townsite, coal mineral land laws, and reimbursed the Tribes or expended for the benefit of the Tribes whatever money was raised by the sales.

The earliest non-Indian settlements in northwestern and north central Wyoming were made near the gold and

silver fields in the South Pass area of the Wind River Range. These mining camps soon expanded into permanent farming and ranching communities. The settlements relied primarily on cattle ranching and dryland or easily irrigated farming for sustenance. By the mid-1800's, many small communities had been established by settlers who had obtained their land under such Congressional Disposal Acts as the Homestead Act, the Desert Lands Act, and the Carey Act.

By the early 1900's most of the suitable land in the region was occupied by ranchers or irrigated farms. Yet the settlers continued to arrive, forcing gradual expansion onto the dry basin floors. This movement prompted the development of many irrigation projects, often sponsored jointly by private citizens and the United States Government.

The arrival of the homesteaders in the Wind River Basin significantly altered the Indian's economic base. As the number of settlers and their farms increased, the number of Indians working their own farms and ranches decreased. The Indians began to rent and eventually to sell their land, while hiring themselves out as laborers.

In 1934, all undisposed of lands that had been ceded to the U.S. by the 1904 agreement were reserved, and in 1940, the Secretary of Interior began a series of restorations to tribal ownership, certain undisposed of lands which were then made a part of the existing Wind River Reservation. In addition, non-restored ceded land was later reacquired by the United States in trust for the Tribes, as were certain lands within the diminished reservation which previously had passed into private ownership.

Special Master's Report

On January 5, 1983, the Special Master filed his report in this Court; a 451-page volume reported his findings, conclusions and recommended decree on the reserved wa-

ter right claims of the Tribes of the Wind River Indian Reservation. This report demonstrates to the Court its rightful exercise of judicial wisdom in selecting Teno Roncalio as Special Master when the Court considers the monumental assignment that confronted the Special Master in dealing with the many complex issues that exist in this lawsuit. This taken into consideration with the almost four years of conferences, hearings and trials held by him with more than 100 attorneys involved in the case leads this Court to the inescapable conclusion that the Special Master handled a Herculean task in a very capable and judicious manner with very reasonable dispatch.

The United States, the Tribes, the State and numerous other parties have filed various written objections to the Special Master's Report which the Court considers together with all the other records in the case.

This Court is cognizant of Rule 53(e)(2) W.R.C.P. which provides: ". . . the Court shall accept the Master's findings of facts unless clearly erroneous" and that "the Court, after hearing, may adopt the report or may modify it. . ." The Court meets with no problem in adopting the Special Master's findings of facts except where a finding is inapplicable to this decision as a result of the Court taking a different position than the Special Master on certain conclusions of law. Such a different position has been reached by the Court in conclusions of law covering the following issues:

1. That the Tribes' reserved water rights, if they exist, are limited to that amount of water necessary to fulfill the primary purpose of the reservation which was agriculture. (When the Court refers to agricultural use, it is including domestic use and livestock use within the meaning of the term and excepts industrial, mineral, municipal, fisheries, wildlife and aesthetics.)

2. To accomplish the purpose of the reservation, Congress did not reserve water for mineral development, municipal needs, industrial development, fisheries, wildlife nor protection of aesthetic natural conditions on the Wind River Indian Reservation. (Provision is made later in this decision to provide water to the Tribes for their now present multipurpose uses.)

3. All Reservation land owned by Tribes in trust or in fee, which at one time was held by a non-Indian, does not have a priority date of July 3, 1868.

4. Beneath the land which is theirs in trust or in fee, the Tribes do not have a reserved right to the groundwater in any of the various aquifers, beyond any now established uses and amounts, but have the right to use any such additional groundwater on equal footing with and under the same restrictions as other water users in the State of Wyoming.

To better understand the Court's reasoning on its departure from the Special Master's position on the above-stated issues, the Court proceeds to discuss the background and facts of this case together with its interpretation of the case law as it applies to the reserved right doctrine.

Reserved Rights

Before the Court can attempt to discuss any of the four above-stated issues, its must first come to grips with the paramount question which demands an answer before all others. Did the Treaty of 1868 reserve for the Tribes the waters needed to develop the Reservation? For if the Court were to answer such question in the negative, then all other issues which this Court has to meet become moot.

The State has espoused the belief that Congress did not intend to reserve water for the Wind River Reserva-

tion and the State is supported in its position by many of the individual defendants who have replied in the lawsuit. The State of Wyoming in such belief finds itself in an antithetical posture from the Tribes and the United States who maintain that at the creation of the Wind River Reservation by the Treaty of Fort Bridger on July 3, 1868, a reserved water right vested in a quantity to meet the present and future needs of the Wind River Indian Reservation and to provide a permanent home for the Tribes.

To sustain the State's position and hold that no reserved right exists would be, on the Court's part, a holding that not only disagrees with this Court's interpretation of what the intent of Congress was but also runs counter to the controlling case law on the subject.

When the reservation was created, the Indians gave up a larger tract of land which had adequate water, satisfying the habits and wants of a nomadic people, for the smaller tract of land with the purpose of changing those habits and turning the Indians into an agrarian society. Would they have given up the one commodity which was so vital and necessary to their new intended purpose of the land? Even though water was not specifically mentioned in the reservation terms, logic alone dictates that the Indians and the United States Government, when the Wind River Indian Reservation was created, intended to reserve water for the Tribes. The water was a necessary commodity. Without water, the reservation could never have accomplished it's prime purpose: the development of agriculture. Much of the reservation land was arid. The water was needed for irrigation and was essential to the raising of crops. Without water most of the land would have been useless.

In support of this reasoning, reference is made to *Winters v. United States*, 207 U.S. 564 (1908) in which the Supreme Court established that the United States,

when it creates an Indian Reservation, impliedly reserves water for needs of the reservation.

In *Winters*, the Gros Ventre and other Indians had, by treaty, ceded to the United States land situated in Montana territory in exchange for their settlement on the Fort Belknap Reservation. The treaty did not expressly reserve water rights. However, the Indians and their agent had appropriated water for use in agency buildings and on land in connection therewith and for use on some 30,000 acres of land in the reservation, and non-Indians contested that appropriation. The Court held that water was reserved by implication in the treaty, inasmuch as water was necessary for the use of the Indians.

> The Indians had command of the lands and the waters (before the signing of the treaty)—command of all their beneficial use, whether kept for hunting, "and grazing roving herds of stock," or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?
>
> By rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians.
>
> That the Government did reserve them (water rights) we have decided, and for a use which would be necessarily continued through the years.
>
> Subsequent U.S. Supreme Court cases have reaffirmed *Winters*.

In *Arizona v. California*, 373 U.S. 546 (1963) the Master found both as a matter of fact and law that when the United States created Indian reservations or added to them, it reserved not only land but also "the use of enough water . . . to irrigate the irrigable portion of the reserved lands."

In answer to the argument made by Arizona that there was a lack of evidence showing that the United States in

establishing the reservation intended to reserve water, the Court said:

> The question of the Government's implied reservation of water rights upon the creation of an Indian Reservation was before this Court in *Winters v. United States* . . . decided in 1908. Much the same argument made to us was made in *Winters* to persuade the Court to hold that Congress created an Indian Reservation without intending to reserve water necessary to make the reservation liveable. The Court rejected all of the arguments.
>
> The Court in *Winters* concluded that the Government, when it created that Indian Reservation, intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless. *Winters* has been followed by this Court as recently as 1939 in *United States v. Powers*. . . . We follow it now and agree that the United States did reserve the water rights for the Indians effective as of the time the Indian reservations were created.

The Wyoming Supreme Court in its 1955 decision of *Merrill v. Bishop*, 74 Wyo. 298, 287 P. 2d 620 (1955) which involved the water rights of non-Indian purchasers of lands originally included in the 1868 Wind River Indian Reservation, said:

> It must, of course, be admitted that according to the holding in *Winters v. United States*, *supra*, the water rights appurtenant to the Indian Reservation here in question, were reserved to the Indians by the Treaty of 1868.

The Court having found that a reserved water right does exist in favor of the Tribes, now confronts the questions that the following issues present:

1. What was the purpose of the reservation when established, and is the primary purpose standard

to be used in determining what limitation may be applied to a reserved right doctrine?

2. To what reservation land does the reserved right apply?

3. What is the proper measurement for the reserved right determination and its application to future needs?

4. Does a reserve right apply to groundwater?

5. What is the amount of water and from what source will the reserved right be given?

To answer such issues, this Court feels that it becomes necessary to consider the actions of the United States both at the time the Reservation was established and during the period of time when the people were settling in the West. After all, the United States was encouraging the settlers to settle in the West which included the Big Horn Basin. Settlement was encouraged through passage of Congressional acts, the most significant being the Homestead Act, Desert Lands Act and the Carey Act. The western lands made available for settlement by those acts were arid, and the fulfillment of the settlers' hopes of farming was entirely dependent an having water for their canals, irrigation ditches and reservoirs.

Following the settlement of non-Indians in the Big Horn Basin, came the establishment and development of cities and towns and then followed the starting and building of industries, all of which required the securing of water rights from the State of Wyoming in accordance with the State water appropriation statutes. For over 100 years non-Indians continued to develop and build in this manner. No attempt was made to thwart these efforts either by the Tribes or the United States, their trustee. Such work and diligence by non-Indians to establish homes and settlements cannot be lightly dismissed or disregarded.

Also to be considered should be the passage of the McCarran Amendment which implies a general policy of deference to state water law.

Thus, the intent of Congress should not only be considered by this Court in the case of the Tribes when they settled on the Reservation but the intent of Congress has to be considered when one looks at the settlement of the Big Horn Basin by the non-Indians.

This Court, in contemplating such, relies on the "sentivity doctrine" as established by the United States Supreme Court, and the doctrine of equitable estoppel.

In *United States v. New Mexico*, 438 U.S. 696 (1978), the United States Supreme Court states that the implied-reservation doctrine must be applied with sensitivity to its impact upon those who have obtained water rights under State law. Justice Rehnquist, speaking for the majority, stated:

> When as in the case of the Rio Mimbres, a river is fully appropriated, federal reserved water rights will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators. This reality has not escaped the attention of Congress and must be weighed in determining what, if any, water Congress reserved for use on the national forests. *Id.* at 705.

Justice Powell, speaking for the minority, made this a unanimous view of the court when he stated:

> I agree with the Court that the implied-reservation doctrine should be applied with sensitivity to its impact upon those who have obtained water rights under state law and to Congress' general policy of deference to state water law.

Although the facts of *New Mexico* dealt with national forests, the principles enunciated in the case have been held to be equally applicable to Indian reservations. *Colville Confederated Tribes v. Walton*, 647 F. 2d 42 (9th

Cir. 1981) (which will be discussed in the part of this decision on future agricultural acreage.)

For the above stated reasons, the Court feels compelled to apply a more strict interpretation of the reserved right theory than that applied by the Special Master.

Purpose

Not only are the Tribes making a claim for a reserved water right for the purpose of agriculture but in addition thereto are making claims on the surface and groundwater for the following multi-purposes:

a. Maintenance of aesthetic values and wildlife habitat

b. Livestock

c. Mineral development and associated industrial activities

d. Municipal

e. Commercial and domestic

f. Instream flows for preservation of optimum fish habitat

To say now that the utilization of reserved water is mandated to fulfill the above-stated multi-purposes as claimed by the Tribes would truly be illogical and inconsistent with the purpose for which the Reservation was created.

To determine the purpose for which the Wind River Indian Reservation was created, it is first necessary to examine the document by which the Reservation was created. That document is the Treaty of July 3, 1868, the Treaty of Ft. Bridger, concluded between the Shoshones and the Bannocks and the United States. (Attached hereto and marked Appendix A and by this reference becomes a part hereof.) Article II of that Treaty, which

was ratified by Congress on February 26, 1869, established the Wind River Indian Reservation. On the very face of the Treaty, it is clear that its purpose was purely agricultural. Like other reservations of the era, the Wind River Indian Reservation was established to convert the Indians thereon from a nomadic people dependent upon hunting to an agrarian people whose livelihood would be earned by farming.

Article VII of the Treaty expressly confirms the Reservation's singular, and hence primary, purpose as an agricultural reservation. It states:

> In order to insure the civilization of the tribes entering into this treaty, the necessity of education is admitted, especially of such of them as are or may be settled on *said agricultural reservations*, and they therefore pledge themselves to compel their children . . . to attend school. . . . (Emphasis added)

No other statement in the Treaty assigns any other purpose to the Reservation. In fact, the remainder of the Treaty is fully consistent with Article VII.

Article VI of the Treaty authorizes allotments to Indians for "farming" purposes. The head of the family received 320 acres, minors under eighteen, 80 acres. Article VIII states that, when an allotment was selected, an allottee who farmed it in good faith would receive seeds and agricultural implements for three years. Under the terms of Article IX, the United States agreed to pay each Indian farming a $20 annual stipend, but only $10 to "roaming" Indians. Article XII established a $50 annual prize to the ten best Indian farmers. No other parts of the Treaty contain any reference to or encouragement of any other occupation or pursuit.

The United States and Tribes have focused their attention on the phrase "permanent home" contained in Article IV of the Treaty, to the exclusion of the Treaty's other portions. They contend that this one phrase vastly

expands the purposes of the Wind River Indian Reservation. Their contention takes the phrase "permanent home" out of context. Article IV reads:

> The Indians herein named agree, when the agency house and other buildings shall be constructed on their reservation named, that *they will make said reservation their permanent home, and they will make no permanent settlement elswhere* . . . (emphasis added)

On its face, Article IV does nothing more than provide that the Indians must live permanently on the Wind River Indian Reservation and not elsewhere. They are to make the Reservation their "permanent home" as opposed to establishing a "permanent settlement elsewhere." Thus, Article IV defined the duration of the Treaty restrictions and limits the right of the Indians to move elsewhere as a Tribe. It does not define the purpose of the reservation. The purpose of the "permanent home," i.e., the Wind River Indian Reservation is, rather, expressly defined by the sections of the Treaty and more particularly described as Articles VI, VII, VIII, IX and XII.

In so holding, the Court follows the reasoning of the many cases which have considered the purpose of "permanent home" reservations. The most detailed analysis of the effect of the permanent home language is found in *Colville Confederated Tribes v. Walton, supra.* In *Colville*, the Ninth Circuit was faced with the task of defining the purpose of the reserved right it found to exist on behalf of the Colville Reservation in Washington. The Court recognized that the Colville Reservation had been created as a permanent home, but that the "general purpose, to provide a home for the Indians, is a broad one." The Court went on, as has this Court, to define the *specific* purpose of the Colville Reservation by reference to the document creating it, the circumstances of its creation, and the history of the Colville Tribe. In

doing so, the *Colville* Court found that the reserved right for the Reservation existed, *not* to serve the general purposes implicit in the permanent home language, but rather to serve the agricultural and fishing purposes of the Reservation only. The Court quantified the reserved right *only* in terms of those specific purposes. While the specific circumstances of the Wind River Indian Reservation do not comprehend a fishing purpose in addition to agriculture, the Court agrees fully with the analysis in *Colville.*

Other cases have also decreed reserved rights for "permanent home" reservations. Interestingly, one of these was *Winters v. United States, supra,* which decreed a reserved right for the Ft. Belknap Reservation for irrigation purposes only. Every other case has followed suit and limited any reserved right decreed on behalf of permanent home reservations to agricultural, generally irrigation, purposes. *United States v. Powers,* 308 U.S. 527 (1939) (Crow Reservation); *Skeem v. United States,* 273 F.93 (9th Cir. 1921); *Hibner v. United States,* 27 F.2d 909 (D. Ida. 1928); (Ft. Hall Reservation); *Anderson v. Spear-Morgan Livestock Co.,* 79 P. 2d 667 (Mont. 1938) (Crow Reservation); *United States v. McIntire,* 101 F. 2d 650 (9th Cir. 1939) (Flathead Reservation); *Tweedy v. Texas Co.,* 286 F. Supp. 383 (D. Mont. 1968) (Blackfeet Reservation).

The Wind River Indian Reservation is a permanent homeland for the Indian thereon. That fact alone does not define its purpose. The sole primary purpose of the Wind River Indian Reservation, the one purpose for which a reserved right can be quantified, must be defined by the Treaty as a whole. That purpose was agricultural,, to convert the Indians from a nomadic to an agrarian people.

The Court considers it significant that the reservations were not designed as "mining", hunting or fishing" or "commercial" reservatio s. The purpose was designated as agriculture.

In support of the Tribes' claim for a sufficient stream flow for fisheries, they have cited the following cases, to wit: *Colville Confederated Tribes v. Walton, supra,* and the *Menominee Tribes of Indians v. United States,* 391 U.S. 404 (1968)

While this Court does not feel that it is necessary to address this issue by reason of its holding that the sole purpose of the Reservation was agriculture, the Court, as an aside, is of the opinion that the cited cases are clearly distinguishable from the instant case.

In the *Colville* case, the Tribe traditionally fished for both salmon and trout. Fishing was of economic and religious importance to them. The case indicated that the Tribe was deeply involved in the commercial business of fishing. In the instant case the only involvement by the Tribes is selling licenses to the public to fish on the Reservation. The Tribes have not shown that they are dependent upon fishing for a livelihood nor has it been an historical part of their traditional life style.

In the *Menominee* case, the facts involved some members of an Indian tribe being prosecuted in the Wisconsin State Court for violating Wisconsin hunting and fishing regulations. The United States Supreme Court held that the Tribe had reserved hunting and fishing rights which differs from the case before this Court where the Tribes are claiming water in specific amounts to maintain a stream flow for fishing.

The Court does therefore reject any reserved water right for fish flows since they do not constitute a primary purpose of the Wind River Indian Reservation.

It appears to the Court that the Tribes and the United States take a somewhat anomalous position as to the Tribes' rights to the water when they contend the Tribes are entitled to an established water right in and to surface and groundwater for not only present agriculture, domestic, commercial, municipal, wildlife, fisheries and

aesthetic uses but also such a reserved water right with an 1868 priority date for all such uses in the future. They project the uses into the future to the year 2020.

But to carry these extended demands one step further, this Court is faced with the additonal request of the Tribes that the decree in this case be open-ended so that the Tribes could make further enlargement of their claims at any time in the future.

This Court not only considers the present demands as being unreasonable but when it considers the totality of what the Tribes are requesting, it demonstrates to the Court an avaricious appetite on the part of the Tribes for practically all of the water in the Big Horn River System.

This Court by its decision is obligated to define the respective rights of the parties so there is no question as to what those rights are. This applies not only to the Tribes but the other water users as well. And this Court will not be associated with any ruling which creates a gossamer haze over the entire Big Horn River System.

Ranchers and farmers wishing to establish a family home and security for themselves and their descendants would be understandably reluctant to invest money and labor in land over which hung the specter of future water claims by the Tribes.

This Court, thus calculates the Tribes entitlement to a reserved water right, with a priority date of 1868, based on the purpose of agriculture (which term includes livestock use and domestic use) and denies such reserved water right for other multi-purpose uses as claimed by the Tribes. The Court by such finding does not intend to dictate to the Tribes that they are restricted as to the use of said reserved water only for the purpose of agriculture, inasmuch as it recognizes that it cannot tell the Tribes how they must use water that comes under a reserved water permit. If the Tribes desire to use so

much of their water for other purposes, they may do so. However, the said uses of the reserved water right will be limited to use within the boundaries of the Reservation. The Court does not see any purpose of the Reservation being fulfilled by allowing use of the reserved right water off the Reservation.

The Tribes are advocating that the Court is without any authority to dictate to the Tribes not only restrictions as to uses of the water but also restrictions on the leasing, selling or even giving of the water for exportation from the Reservation. The Court does not feel that the purpose of the Reservation will be served by allowing for any reason the use of the water off the Reservation, and so holds that the water if leased, sold or given, is to be used only within the boundaries of the Reservation.

Land to Which Reserved Rights Apply

This case presents a factual situation which this Court has not encountered in any similar cases. The Court is aware that this is not a boundary case (indeed, the reservation boundaries have been stipulated to by the major parties) nor is it a title case. However, as Tribal land is the basis of measurement for the reserved rights doctrine, Tribal ownership of land is an issue.

The history of the Wind River Indian Reservation shows that the size of the original reservation as set out in the Treaty of 1868 was reduced by several sales of land to the United States by the Indians, first in 1872 (the Lander Purchase) and then in 1896 (the Thermopolis Purchase.) In the Second McLaughlin Agreement (also called the 1905 Act) a large tract of reservation land was ceded to the United States. The land that remained in Tribal ownership was called "the diminished reservation." A part of this ceded land was settled by non-Indians through various Congressional settlement acts. What was not sold was held by the United States in trust for the Tribes and later restored to them. Some of

the ceded land settled originally by non-Indians has since been reacquired by the Tribes, as have certain tracts of the "diminished reservation" land, owned in fee by Indians, but later sold to non-Indians. This land has been identified in this case as "reacquired land". It is the contention of the Tribes that once this land was reacquired by the Tribes, it re-attained its Indian status for purpose of a reserved water right with an 1868 reservation priority date.

The Tribes claim that originally all Reservation lands were owned by them, with a *Winter's* doctrine right for all irrigable reservation lands. They say that no statute —including the 1905 Act—removed their water rights to lands homesteaded by non-Indians. It is the position of the Tribes that when such lands are reacquired, the original reservation purpose is again effectuated, and reserved water may be put to use on these lands on the same basis as other lands of the Tribal homeland.

This Court cannot accept that position. The reserved rights doctrine is a unique Indian right. It does not extend to subsequent purchasers of Indian land.

The U.S. District Court in *Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320 (1978) dealt with the question of whether a non-Indian grantee of an Indian allotment succeeds to his Indian grantors reserved rights.

The Court analyzed the rationale for development of the reserved rights doctrine and the recent Supreme Court opinions concerning the concept of reserved rights generally:

> An analysis of the rationale for the reserved rights doctrine convinces this Court that the implied reservation of waters of Indian reservations should be limited to Indian ownership. *Winters* doctrine rights were reserved to members of the Indian tribe living on the reservation.

> Water was impliedly reserved to ensure that the lands intended to be permanent homelands for the Indians would have the necessary water to fulfill that purpose. When title to Indian lands passes into non-Indian hands, the purposes for which the reserved water rights are implied no longer exists. It therefore seems logical to conclude that reserved water rights on Indian reservations are limited to Indians.

The reserved water right is not a right which hovers above original Reservation land, descending and attaching to the land, so to speak, when the land is reacquired by the Tribes from non-Indians. Nor is it a vested Tribal right which only manifests itself when the land in question returns to Tribal ownership. It is a reserved right given to Tribes to effectuate the purpose of the reservation—to make a homeland for them. When the Tribes, for whatever reason, chose to diminish their homeland by selling land, they relinquished the reserved water right for that land.

Even the United States sustained such a position when it filed on September 4, 1980, "Reply of the United States to Wyoming's Response to the Claims for Water Rights of the United States." The United States said on page 15:

> "All of the reserved water rights for the Wind River Indian Reservation have a priority date of 1868 *except* for those which are *for use of lands sold to non-Indians and later* repurchased." (emphasis added)

It is this Court's view that when Indian reservation land left Indian ownership or United States Trust status, it lost its original reservation land status for purposes of a reserved water right priority date of 1868. That land entered the free market place. The non-Indian purchaser did not acquire an Indian water right when he purchased the land. He applied for and acquired a State water right with an applicable priority date. If the non-Indian pur-

chaser did not have a state permit, the earliest priority date which could be given to that water right in equity, would be the date the non-Indian acquired the land and began putting the water to beneficial use. When the Indian later reacquired this same land from the non-Indian, the Indian purchaser acquired what the non-Indian owned, that is, he acquired land with a water right priority date later than 1868.

The Tribes have made an eloquent argument that they are trying to rebuild their land and their efforts should not be defeated by a narrow interpretation of this issue. This Court is aware of that fact. It accepts as law that the Indians have a reserved right with a priority date of 1868 (the senior water right in Water Division No. 3) for all land continuously held by Indians or the U.S. in trust for Indians. That also includes the land ceded to the United States in 1905 but never sold to non-Indians. On this point, the Court concurs with the conclusion of the Special Master that this land was held in trust for the Tribes by the United States and never lost its Indian status.

However, once the Indians, regardless of the historical facts which compelled them to do so, entered the market place to sell or buy reservation land, they by choice began dealing on an equal footing with non-Indians in the region, who were also trying to make homes and build settlements.

Therefore, this Court holds that July 3, 1868 is the priority date for the land continuously held since the date of the Treaty by Indians—Tribal or in fee—or the United States in trust for Indians, and that Tribal land which left Indian ownership but was later reacquired by the Tribes has a reserved water right priority date of whichever is earlier: when the land left Indian ownership and was purchased by a non-Indian, or the date of the applicable state water permit.

The Tribes are not entitled to a reservation reserved water right for those lands outside of the stipulated

boundaries of the Wind River Indian Reservation known as the Arapahoe Ranch and the Padlock Ranch that have been purchased and are held in trust by the United States for the Shoshone and Arapahoe Indians.

The Court holds that the Tribes are entitled to a water right as of the date of the applicable state permits, but the confirmation of the state water permits owned by the Tribes which apply to these said lands will be considered in the third phase of this case.

Proper Measurement for the Reserved Right Determination

The Court now must determine the measurement of the water right it has awarded to the Tribes. Initially, the United States on behalf of the Tribes, and the Tribes on their own behalf, made a total request for Indian reserved rights water of more than 1,500,000 acre feet per year. The Special Master, in his conclusions, did not support that request.

The claims of the United States and Tribes fall into two main categories: water for lands now and historically irrigated, called the "historic" acreage, and water for lands which would qualify now or in the future as practicably irrigable acres, called the "future" acreage.

Historic use of water for irrigation includes water for trust land unadjudicated but currently in use, adjudicated trust lands, lands previously irrigated but currently idle, lands not in use but irrigable from existing canals, and Indian fee lands.

The State took the position that virtually none of the historically irrigated lands should be accorded a reserved water right because the United States and Tribal experts failed to qualify it as practicably irrigable acreage.

The Court accepts as reasonable the Special Master's presumption of irrigability for "historic" lands, and notes

that when expert testimony successfully rebutted this presumption, the Master made corresponding adjustments in this findings.

Except where the Court deviated from the Special Master's Findings and Conclusions as to after-acquired land and except where this Court differs by reason of the variance created as a result of its holding that reservation reserve right is applied solely to agriculture land, the Court accepts and adopts the Special Master's conclusion as to which "historic" land should be awarded a reserved right.

While this Court has quantified the Tribes reservation reserved water right of 1868 only for certain historic acreage and then only for the sole purpose of agriculture, the Court is now presented with the perplexing issue of the application of the reserved rights to future acreage which would meet the test of practicably irrigable acres.

It is quite apparent from the report that the Special Master, in making his award to the Tribes of 188,977 acre feet per year with a priority date of 1868 for future agricultural development, considered that such was a complex issue which the Court should approach with caution. This is evidenced by Article VI of his recommended decree in which he made provision for limitation of the five awarded future projects. Reference is made to his Report at page 342:

> Provided further, that should the decision of the Tribes be to proceed with future irrigation projects in lieu of other uses, then and in that event not more than ten percent (10%) of the total acreage of the said future projects can be put into effect in any given decade, unless upstream storage facilities shall have already been constructed to provide water for the additional acreage of said future projects.

The Special Master's reasons for his imposed limitations are (1) that the delay in building the five projects is to

avoid the possibility of economic damage to other water users in the District and (2) to encourage the parties to enter into negotiations for upstream storage.

The Tribes attack these two reasons given by the Special Master by submitting that both contradict the 1868 priority that the Tribes are entitled to. In discussing the limitations to avoid the possibility of economic damage to other water users, the Tribes rely again on the *Winters* case. But in that case, the Court was dealing with "historics" alone which distinguishes the *Winters* case from the instant case in which the Court has both the historic and future claims to quantify.

This Court is quite cognizant of the United States Supreme Court ruling in *Arizona v. California*, *supra*, whereby the Court ruled that sufficient water is reserved to satisfy the future as well as present needs of the Indians. But that court was not faced with the factual situation that confronts the Court in this case. That is that the Tribes are demanding a reservation reserve right for seven agricultural projects involving 235,000 acre feet of water, without any limitation imposed thereon. This demand is made after the passage of 115 years of time and the expenditure of millions of dollars not only by the non-Indians, the industries and the cities and towns of the Big Horn Basin, but also by the United States Government in promoting and helping in the settlement of the Big Horn Basin.

The Court now discusses the issue of whether the Tribes are entitled to a reservation reserve right in the future acreage.

Future needs of a Tribe are determined by the practicable irrigable acreage test, promulgated by the U.S. Supreme Court in *Arizona v. California* in 1963. The Supreme Court said:

> We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the

> future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acres on the reservations.
>
> We have concluded . . . that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage.

The practicable irrigability test was used by the Special Master in the instant case to determine which "future" acreage qualifies for the reserved water right. However, since the Court in *Arizona v. California* did not define practicably irrigable acreage, the State, the United States and the Tribes agreed upon one definition, to wit:

> Practicably irrigable acres are those acres susceptible to sustained irrigation at reasonable costs.

A second definition was proposed by the Tribes but was not used by the Special Master.

The Court accepts the Special Master's use of the stipulated definition of practicably irrigable acreage in his evaluation of "future" land to be awarded a reserved right.

As to future agricultural development, the Special Master analyzes the months of testimony by both sides and concludes that there are 48,520 acres that the United States and the Tribes have proved to be practicably irrigable that have never been put into irrigation. The Special Master then finds specifically that the Tribes are entitled to a diversion of 188,977 acre feet per year measured by those acres with a priority date of 1868.

The 48,520 acres of practicably irrigable land found by the Special Master were within five proposed irrigation projects, known in the trial and referred to in the Special Master's report as the five "future projects," as follows: North Crowheart (34,993 acres awarded); South

Crowheart (4,238); Arapahoe (3,437); Riverton East (3,442) and Big Horn Flats (2,410).

Two additional future projects claimed by the Tribes are Big Horn Flats Extension and Stagner Ridge for which the Special Master awarded no water.

This Court being of the opinion that the five proposed irrigation projects are in keeping with the primary purpose of the reservation, to wit: agriculture, accepts the special Master's award of a reservation reserved right for the said five projects and sustains the Special Master's denial of any award for Big Horn Flats Extension and Stagner Ridge projects.

The United States and Tribes have urged the Court to take into consideration population growth and the Special Master in his report has made certain findings and conclusions contemplating such growth. In view of the fact that the Court has held that the purpose of the Reservation is agriculture, and has made an award for "future" agricultural projects, it has, by doing so, also made a provision for population growth.

The State has advocated that the application of the doctrine of equitable estoppel to prevent the United States and the Tribes from claims inconsistent with the water rights acquired by state law by the United States on behalf of the Tribes. While this Court agrees with the State that the modern trend is to permit estoppel against the Federal Government, the Court will not consider the estoppel doctrine on the issue of State-awarded-rights versus the reservation reserve water rights. In fact, the Court considers said issue moot by reason of its previous rulings in this decision and further the application of the doctrine in such an instance would be harsh and inequitable.

But the Court will consider the equitable estoppel doctrine in the issue of the Tribes' future awarded projects.

The present day status of the law of estoppel as applied to the Federal Government is summarized in *United States v. Lazy FC Ranch*, 481 F.2d 985 (9th Cir. 1973). The Court reviewed the leading cases of *Moser v. United States*, 341 U.S. 41 (1951), *Schuster v. C.I.R.*, 312 F.2d 311 (9th Cir. 1962) and *Brandt v. Hickel*, 427 F.2d 53 (9th Cir. 1970) and stated:

> The Moser-Brandt-Schuster line of cases establish the proposition that estoppel is available as a defense against the government if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel. (citation) This proposition is true even if the government is acting in a capacity that has been traditionally described as sovereign (as distinguished from proprietary although we may be more reluctant to estop the government when it is acting in this capacity. *Id.* at 989. (footnote omitted).

The United States can indeed be estopped, provided the conditions mentioned in *Lazy FC Ranch* are met: (1) the government's conduct threatens serious injustice and (2) the public interest would not be "unduly damaged" by estoppel. The next issue is whether the elements of equitable estoppel exist in this case.

Concerning the elements of estoppel, the party asserting estoppel must show: (1) lack of knowledge of the facts; (2) no means of discovering the facts; (3) reliance upon the actions of the party to be estopped; and (4) a change of position. *Cheyenne Dodge, Inc. v. Reynolds and Reynolds, Inc.*, 613 P.2d 1234 (Wyo. 1980).

The analysis necessary to estop the Federal Government requires two steps. First, the elements of estoppel must be satisfied. The party seeking to invoke estoppel lacked both knowledge of the facts and the means to obtain the facts and relied to his detriment on the other

party's acts. Second, in order to estop the Federal Government there must be serious injustice and no undue damage to the public interest.

The case at bar is replete with examples of the unanswered questions existing in the law of reserved water rights. Using different definitions of such concepts as irrigable, arable, economically feasible, the parties have arrived at vastly different figures of the amount of "practicably irrigable acres." Thus, even if residents of Wyoming knew of the doctrine of reserved water rights, they could not have known the quantity of those rights or the impact on their own rights.

Without a recognizable threat of significant harm, the people of Wyoming could not have known of the sizable reserved water claims asserted here. They had no means of discovering the facts. Thus, the first two elements for estoppel are met: no knowledge and no means of knowledge.

The detriment in this case is readily apparent. The United States has asserted claims for water in excess of the amount available in many regions in the Big Horn Basin. Holders of state-awarded water rights will find their formerly valuable water rights worthless. They will be unable to continue their ranching and farming operations.

The Court has previously stated in this discussion on estoppel that it would not consider the doctrine as applied against the United States and hold that the United States is estopped to claim any reservation reserved water rights because of its past actions in filing for state water permits. But the Court will consider the practice of the United States in filing for state water permits when such actions are considered together with all the other acts of the United States in misleading the individual water users to assume that the United States would not later assert future rights with a 1868 priority date.

In reliance on the United States' action, individuals invested in the construction of irrigation works and in their ranches and farms. None of this would have happened had the water users known that the United States had a superior right to take all their water.

A case in point is the City of Lander, which relied upon the Federal acts and conduct of the Federal Government in the last decade. It undertook the construction of a new water supply treatment system to serve the City, the Lander hospital and the State Training School, which provide valuable services to Indians and non-Indians alike.

In compliance with the Safe Water Drinking Act and other Federal laws and regulations, the City of Lander hired firms to design and construct a supply and treatment system and to petition the State Board of Control to consolidate its points of diversion to one point of diversion on the Middle Fork of the Popo Agie to be the most economically and technically efficient point of diversion and delivery system that could be designed, constructed and operated. The City of Lander relied upon the past and current actions of the Federal government as to the stability of their water rights in seeking and receiving Federal participation in the amount of a $2.5 million EDA grant and a $.5 milion FHA grant for the design and construction of the system, which said Federal participation amounted to approximately one-half of the cost of the system. Testimony in the case documented the City's reliance upon historical diversion.

Hence the third and fourth elements of estoppel are satisfied; reliance and damage.

The remaining step in the analysis is to determine whether the Federal Government should be estopped.

Under *Lazy FC Ranch* the Federal Government can be estopped if two conditions are met: (1) the government's conduct threatens to work a serious injustice and (2) the public's interest would not be unduly damaged.

With respect to the first condition, no extended discussion is necessary on the point that in the West to take away one's water is a serious matter. Investments and livelihoods depend on state-awarded water rights. To eliminate these rights by permitting the United States to assert claims inconsistent with its earlier acts is a serious injustice.

The second requirement stated by the *Lazy FC* decision is that no undue damage occur to the public's interest by application of estoppel. What the *Lazy FC* court apparently meant by this second requirement was that estoppel cannot be used to cripple the government's ability to carry out its functions. One of the cases relied upon by *Lazy FC* was *Brandt v. Hickel*, 427 F.2d 53 (9th Cir. 1970), where estoppel was successfully asserted against the Secretary of Interior because of the Department's mishandling of an oil and gas leasing. The Secretary in that case was concerned that the "estoppel doctrine can have a deleterious effect on administrative regularity." *Brandt*, 427 F.2d at 57.

The injury to residents who relied on the United States' actions is so serious that estoppel can, and should be, used to prevent the harm caused by the United States' inconsistent actions.

The settlement of the West would have been greatly altered if the settlers had been told than what the United States asserts now: that necessary water had already been reserved for the use of Indians. The inconsistency between the federal acts of the previous century and the federal future claims before the Special Master form the basis for the application of the doctrine of equitable estoppel.

While this Court has held, as heretofore evidenced in this decision that the awards of reservation reserve rights for the five future projects should be granted, it is convinced that some limitation has to be placed on the

construction of same to alleviate the damage that could be caused to the other water users.

The Wyoming Supreme Court has stated "While Indian rights are to be regarded favorably, that should be done within reasonable limits". *Merrill v. Bishop, supra,* at page 314.

The United States Supreme Court has further stated that in the case of a fully appropriated river, "Federal reserved water rights will frequently require a gallon-for-gallon reduction in the amount of water available for a water-needy state and private appropriators." *United States v. New Mexico, supra.*

Even the Tribes, in their "Exceptions To The Special Master's Report," recognize that various measures to take care of the other water users may be considered in the future. Reference is made to p. 18 of the Exceptions where the Tribes state:

> No one expects the Tribes to build all five, or seven projects immediately. To obtain money from Congress to build the projects might require political cooperation from the State. Various measures to take care of junior water rights holders may be the price of any such cooperation.

As this Court indicated at the beginning of its discussion on the future projects, the Special Master recognized the problem and imposed limitations.

In response to same, the Tribes in their Exceptions on p. 19, state:

> Thus, there is no legal or evidentiary basis for the Special Master's limitations, and the limitations themselves are beyond the intended or lawful limits of this litigation, and cannot properly be adopted by the Court.

While the Court agrees that the Special Master's finding of a limitation of only ten per cent of the total acreage

of the five future projects in any given decade may be unreasonable and not economically sound, it does agree with the Special Master's recommendation of upstream storage.

The Tribes made quite cogent argument that the Court would be wrongfully placing the burden on the holders of the senior water rights if it imposed the condition that upstream storage has to be in place before the construction of the five future projects could be started. But because of the uniqueness of this case in that 115 years have passed without any overt action taken towards development of lands within the five future projects, and the actions of the United States which give rights to the application of the doctrine of equitable estoppel, this Court is going to impose the limitation that upstream storage has to be constructed and in place to provide water for the additional acreage of each of the five future projects before construction can be started on that project.

While the Court is aware that some cases hold that estoppel is not available to defeat Indian treaty rights, it distinguishes such holding from the application of the doctrine in the instant case, when the Court is only using the doctrine for the purpose of imposing a condition and not for the purpose of defeating treaty rights.

In the most recent handling of the *Arizona v. California* case by the United States Supreme Court, —— U.S. ——, No. 8, Orig., Slip Opinion (March 30, 1983) the Supreme Court made a decision which buttresses this Court's ruling on the five future projects and this Court's imposition of the limitations thereon. The Supreme Court strongly indicates that it too was concerned about the effect of additional reserved water rights being given to the Indians to the detriment of other water users. That indication is noted on page 14 and 15 of the March 30, 1983 decision. Justice White states:

> . . . but, due to the high priority of Indian water claims, an enlargement of the Tribes' allocation can-

not help but exacerbate potential water shortage problems for these projects and their States.

If the Tribes feel that this limitation injures them or their water rights as granted by the Treaty of 1868, then perhaps they should consider making application for compensation from the United States Government for their loss.

Many of the parties, in their Objections to the Special Master's Report, have stated that the Special Master's recommended decree does not contain sufficient detail for its own administration. The State argues the decree does nothing to relieve the uncertainty caused by reserved water rights since other water users cannot determine the location of the diversion points, the land to be irrigated, the rate of diversion or the allowable depletions from the river system associated with these water rights.

The Court states again the premise that the determination of "historic" acreage and "practicably irrigable acreage is used *only* as a measuring device to calculate the Tribes present and future needs. The requirements of an adjudication of a reserved right are different than those of a state awarded water right. The granting of a reserved right does not limit the usage of the water nor does it compel the Tribes to use the water on any particular tract of land. When the Tribes determine where and how they wish to use the water granted in this decree, they will inform the proper authorities who will then be able to make the specific determinations which are necessary for administration of a water right.

If the Tribes, however, choose to change the use of their water from the amount contemplated for agricultural use, they are limited to that amount as would have been consumptively used for irrigation.

The parties have all urged a modification in the Special Master's ruling which limits non-agricultural consumptive use of waters to no more than 25 percent of the annual

diversion requirements. The definition suggested by the parties and heretofore adopted by the Court is that the change of water right is limited to the amount of water historically consumed in benefical use, being "net irrigation requirement", *Basin Electric Power Coop. v. State Board of Control*, 578 P. 2d 557, (Wyo. 1978).

The Master provided in his recommended decree that the State Engineer should have the right to monitor diversions for irrigation and stock watering.

The Court finds that effective administration of both Indian and non-Indian and Federal and state-awarded water rights requires a single administrative system and agency. A nonunified and inconsistent dual system of administering Federal and state-awarded water rights would introduce inefficiency and uncertainty to the detriment of all water users and contrary to the legislative intent that led to the enactment of the McCarran Amendment.

The Court finds that the State Engineer has responsibility for the administration of all state-awarded water rights in Division 3 as well as the Indian and Federal non-Indian water rights.

In the *Jicarilla Apache Tribe v. the United States*, 601 F. 2d 1116 (1979), the Tenth Circuit Court implies state administration in citing *Montoya vs. Bolack* (p 1135) where the Court said:

> Congress itself has recognized that the Indians must, at some time, become an integral part of the country and gradually be assimulated into society.

Reserved Right Application to Groundwater

Groundwater is nature's cache for the future needs of mankind. Surface water, replenishable and measurable, can be apportioned among users. In any year, wet or dry, only that which is available can be divided. Groundwater

is not so easily quantified. Although a principal source of groundwater is surface water flowing over the alluvium deposits, nonetheless, the depth and extent of the groundwater supply is still largely unknown. The question the Court must answer here is whether to extend the reserved right doctrine to include groundwater.

The Special Master in his report stated that there was little evidence or argument regarding groundwater. Indeed, the only United States Supreme Court case which deals with the subject is *Cappaert v. United States*, 426 U.S. 128 (1976), cited by the several parties to support opposing positions.

The Court has already held that by virtue of the *Winter's* doctrine, the Tribes have a reserved water right to satisfy the purpose of the Reservation. As one of their claims for this reserved right, the United States and the Tribes assert that the Tribes own the water beneath the Reservation. Neither federal law, however, nor the law of the State of Wyoming support this proposition.

The reserved right doctrine was created and has been defined by decisions of the United States Supreme Court. That body has never extended the doctrine to include a reserved water right in underground water. Rather, it has scrupulously avoided doing so.

In *Cappaert v. United States, supra,* the question presented was whether the reservation of Devil's Hole in Nevada as a national monument reserved federal water rights in unappropriated water.

Devil's Hole is a deep limestone cavern in Nevada. Approximately 50 feet below the opening of the cavern is a pool which is a remnant of the prehistoric Death Valley Lake System. In 1952, a 40-acre tract surrounding Devil's Hole was made a part of the Death Valley National Monument. The 1952 Proclamation noted that Death Valley was set aside as a national monument "for the preservation of the unusual features of scenic, scien-

tific, and educational interest therein contained." The proclamation noted that Devil's Hole is near Death Valley and contains a "remarkable underground pool."

In 1968, the Cappaerts, who owned a ranch near Devil's Hole, made an appropriation pursuant to Nevada law and began pumping groundwater near the monument. That action lowered the water level of the cavern to a point that it was impossible for the pupfish in the pool to breed.

In the case that followed, the District Court and Ninth Circuit Court of Appeals both held that the fundamental purpose of the reservation of the Devil's Hole Pool was to assure that it would not suffer changes from its conditions at the time the Proclamation was issued in 1952. They held that the implied reservation of water doctrine applied to groundwater as well as to surface water.

The United States Supreme Court granted certiorari to consider the scope of the implied reservation of water rights doctrine. While finding a reserved water right on behalf of the pool, the Court was exceedingly careful not to extend the reserved right doctrine to underground water.

> The implied-reservation of water doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more.
>
> No cases of this Court have applied the doctrine of implied reservation of water rights to groundwater.
>
> Thus, since the implied-reservation-of-water doctrine is based on the necessity of water for the purpose of the federal reservation, we hold that the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater.

The Supreme Court had every opportunity to expand the reserved right doctrine in *Cappaert*. In spite of the fact that the Federal Circuit Court decision in the case had attempted to extend the doctrine to include under-

ground water, and in spite of the Supreme Court's nearly unilateral approval of the Ninth Circuit's decision, the Supreme Court refused to approve its extension of the doctrine to underground water.

In *Cappaert*, the Court looked at the purpose of the reservation. Whatever limitations were placed on the Cappaerts' diversions which affected the water level, the Supreme Court did so because of the purpose of the reservation—the preservation of the pool, for one. In the instant case, the Court has already established the purpose of the Wind River Indian Reservation—a homeland with an agrarian way of life for the Tribes.

That purpose has been fulfilled. The Tribes have been given a reserved water right to irrigate historically irrigated acreage and also all the practicably irrigable acreage on the reservation, an established, acceptable measurement of their present and future needs. *Arizona v. California, supra.* The standard used in this case to determine the reserved right is the amount of water necessary to fulfill the purpose of the reservation. The purpose of the reservation is satisfied. This Court does not feel there is any compelling reason to extend the reserved right doctrine to include groundwater.

In the State of Wyoming, ownership of overlying land carries with it no right to underground water. The Wyoming Constitution, Article 8, Section 1, says:

> 1. Water is state property.
>
> The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state.

The State applies the doctrine of prior appropriate to underground water. As in the case of surface water, the right to use underground water is acquired solely by placing the water to beneficial use. The Wyoming Constitu-

tion also states in Article 8, Section 3, that "no appropriation shall be denied except when such denial is demanded by the public interest." This gives all state water users the right to appropriate groundwater, and yet is serves as a conservation measure in assuring water is used for the public good. It means that no one has unlimited right to use or mine groundwater without regard for his neighbor.

The Court is cognizant of the fact that Tribes on reservations are not subject to the laws of the state in which they are located. The water rights awarded to the Tribes in this case are not bound by the same constraints as are water rights owned by other state users. However, the Court has ruled that the State of Wyoming owns all groundwater, even that which flows beneath the reservation. Therefore, the Tribes will be governed by the same rules and regulations as others in the State. They must follow the doctrine of prior appropriation and concomitantly, they are afforded equal protection of their rights. If they, or any party, feel that their groundwater supply is being threatened by another, they have full right to bring an action in any court of competent jurisdiction to protect that groundwater suppy. Neither the Tribes nor anyone else has the right to drain the groundwater supply without regard to others.

The Special Master has noted in his report that it has been the policy of the Tribes to drill wells for both domestic and livestock uses, and deeper water wells for secondary recovery of oil in the Reservation's oil fields. He states there is no indication that individual Indians applied for state permits for their domestic wells, but that oil companies operating on the Reservation have, over the years, applied for and received state permits to drill water wells for secondary recovery.

The Court holds that the Tribes have the right to use any water from wells already in place for domestic and livestock purposes and mineral extraction, those "protected" by a State permit and those which are not. How-

ever, in the future, the Tribes have the same right enjoyed by all other residents of the State in the groundwater of the State—the right to make an appropriation for use and enjoyment. There is no reserved right to this water.

Based upon the foregoing, the Court makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. The Wind River Indian Reservation, established by Treaty, July 3, 1868, lies within Water Division No. 3 of the State of Wyoming, and its boundaries are agreed to by major parties herein.

2. The boundaries of the Wind River Reservation encompass the lands described in Article II of the Treaty of July 3, 1868, less the lands described by the Lander purchase of 1872 and the Thermopolis purchase of 1896. The boundaries of the Wind River Indian Reservation, and the land included within those boundaries are recorded in the "Stipulation Concerning the Boundaries of the Wind River Reservation" filed by the parties with the Court in this case.

3. Article IV of the Treaty provided that the Indians ". . . will make said reservations their permanent home . . ."

4. Articles II, VI, VII, VIII, IX, XII of the Treaty of 1868 establish that the primary purpose of the Wind River Indian Reservation was an agricultural reservation.

5. Wyoming was admitted to the Union by an Admission Act passed by Congress on July 10, 1890, twenty-two years after the Reservation was established. Section 1 of the Act confirmed the Wyoming Constitution.

6. Article 8 of the Wyoming Constitution addressed water and the prior appropriation system as follows:

"Article 8, Sec. 1. The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state.

Article 8, Sec. 3. Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests."

7. No provision in the Act of Admission addresses the Treaty of 1868 or the repeal of any provision of that Treaty.

8. The Act of March 3, 1905, amended, modified and ratified the Agreement of April 21, 1904, commonly known as the Second McLaughlin Agreement, between the United States and the Shoshone and Arapahoe Tribes. Approximately 1,480,000 acres of Reservation land north of the Wind River and east of the Popo Agie were opened to disposal to non-Indians under the provisions of the homestead, townsite, coal and mineral lands laws, or by sale for cash, as provided in the Act. The ceded land is described as follows:

"Beginning in the midchannel of the Big Wind River at a point where said stream crosses the western boundary of the said reservation; thence in a southeasterly direction following the midchannel of the Big Wind River to its conjunction with the Little Wind or Big Popo-Agie River, near the northeast corner of township one south, range four east; thence up the midchannel of the said Big Popo-Agie River in a southwesterly direction to the mouth of the North Fork of the said Big Popo-Agie River; thence up the midchannel of the said North Fork of the Big Popo-Agie River to its intersection with the southern boundary of the said reservation, near the southwest corner of section twenty-one, township two south, range one west; thence due west along

the said southern boundary of said reservation to the southwest corner of the same; thence north along the western boundary of said reservation to the place of beginning."

9. Article III of the 1905 Act provided that a portion of the proceeds from the sale of opened land would be used to take such steps:

". . . as are required by the statutes of the State of Wyoming in securing water rights from said State for the irrigation of such lands as shall remain the property of said Indians, whether located within the territory intended to be ceded by this agreement or within the diminished reserve."

10. The 1905 Act establishes a trust relationship between the Tribes and the United States, with the United States acting as the trustee for the sale of certain Indian lands to settlers.

11. Indian title to the opened lands was not extinguished until specific plots of land were actually sold or entered, and the Department of the Interior maintained exclusive jurisdiction over grazing on opened lands which were not sold or entered.

12. Between the opening of the Reservation lands in 1905 and when further disposal of lands was discontinued, proceeds realized by the grazing leases on the opened lands were not treated as general revenues to the United States Treasury but were instead paid to or expended for the benefit of the Indian through Tribal accounts.

13. By stipulation of the major parties, all of the ceded or opened land, whether owned by Indians or non-Indians, is within the boundaries of the Wind River Indian Reservation.

14. By June 12, 1914, 128,986.56 acres of the ceded land had been sold, realizing $251,642.97 for the Tribes.

In 1915, the Commissioner of Indian Affairs recommended that further sales be postponed indefinitely; subsequently, the Secretary of Interior so ordered.

15. In 1934, the Secretary of Interior temporarily withdrew further disposition of lands within the area opened by the 1905 Act.

16. On April 17, 1940, the Secretary of Interior, upon finding that restoration of undisposed, ceded lands to Tribal ownership would be in the Tribal interest, ordered lands not disposed of under the 1905 Act restored to the Wind River Indian Reservation.

17. The Court finds that some lands have left Indian ownership and subsequently, have been reacquired by the Tribes.

18. Agriculture and related uses existed on the Wind River Indian Reservation and contributed to the food base for the Indians during much of the latter half of the nineteenth century.

Historic Lands

19. The United States began the presentation of its case with the tesitmony of Ronald Billstein of H.K.M. Associates. The interpretation of aerial photographs made between 1939 and 1979 by United States' experts, was supplemented and checked by field inspection of each tract claimed as historically in use outside of the Federal Irrigation Projects, and by review of assessment records and delivery system maps within the Federal Irrigation Projects.

20. On-site hydrographic verification and soils classification on all lands in the historic land base was done under the direction of Albert Kersich, President of H.K.M. Associates.

21. The United States presented its case on engineering studies and water requirements in adjudicated, un-

adjudicated in-use, and Type VII land claims through the testimony of Thomas Stetson, President of Stetson Engineers. Dr. Woldezion Mesghinna, also of Stetson Engineers, presented similar testimony for the United States concerning the Type VIII land claim.

22. The evidence presented by Thomas Stetson and Dr. Mesghinna was credible and persuasive.

23. Excluding the Upper Wind Unit, the average overal efficiency of the Federal Irrigation Projects is thirty-five percent (35%). Historic overall efficiencies on non-project lands also average thirty-five percent (35%).

24. United States' economic feasibility expert David Dornbusch performed an economic evaluation of each tract of Type VII and VIII lands, in the same manner he evaluated "future" lands.

25. Irrigation of Type VII and VIII lands included in the final totals is economically feasible.

26. A benefit/cost ratio, the present value of returns from the land divided by the present value of the costs necessary to generate those returns, of less than "one" or "unity", indicates economic infeasibility.

27. The irrigation of historic lands in the final totals is clearly feasible.

28. No economic analysis was necessary, nor was one done, on adjudicated or unadjudicated in-use lands.

29. In considering Type VII land and Indian fee potentially irrigable acres, State economic expert James Jacob could not support the State's claim that the benefit/cost ratios of the historic lands study are below unity.

30. The State of Wyoming presented Craig Sommers' testimony to show that 5,017.1 acres of adjudicated lands were nonarable by United States' standards. He did not disprove that water was being beneficially applied to 12,395 acres.

31. The State showed 3,575.9 acres of Class 6 lands within the unadjudicated in-use claim. Class 6 land is that which does not meet the minimum standards or requirements of arability under the land class standards used by the United States experts, and is therefore non-irrigable.

32. The irrigability of another 879 acres of unadjudicated in-use lands was discredited by notes in the logs of United States experts.

33. The unadjudicated in-use totals included 1,778 acres of subirrigated land, which United States expert Billstein admitted was classified nonarable.

34. State witness Sommers pinpointed 55.6 acres more appropriately typed as idle, or Type VII, land.

35. Two parcels within the unadjudicated in-use claim are owned by non-Indians. They total 10 acres.

36. The 34,427 acres claimed by the United States as unadjudicated in-use contains 6,298 acres not entitled to a reserved water right.

37. After modifications made during analysis by Federal experts, the United States' benefit/cost analysis at a 4% real rate of interest showed 7,946 acres feasible out of the original Type VII claim of 8,002 acres.

38. There was a general relaxation of standards used by United States experts in Type VII land classification.

39. The arability conclusions of United States experts for Type VII lands had deficiencies which warranted subtracting the acres from the final totals.

40. Class 4 and Class 6 Type VII lands are too marginal to be awarded a finding of practicably irrigable, and are excluded from the final Type VII totals.

41. Lands which do not have sufficient depth to water table and consequently classify as wet lands, or lands

which are sub-irrigated by seepage from adjoining irrigated lands, should not be considered as practicably irrigable acreage, and are not given a reserved water right.

42. Type VIII lands are within the boundaries of the Wind River Federal Irrigation Projects in the Upper Wind Unit, the Little Wind Unit and Johnstown Unit.

43. Class 4 and Class 6 Type VIII lands are too marginal to be used as a measure for a reserved right.

44. Type VIII lands and lands claimed within the Owl Creek Unit have attributes comparable to future project lands, and were analyzed in the same manner. Acres which could not be irrigated from an engineering standpoint, and those which would not be economically feasible to develop, were eliminated.

45. The assertions of Tribes' expert Higginson regarding Indian fee land were not supported by the record.

46. The diversion requirements developed by United States expert Mesghinna and by Tribes expert Higginson are reasonable.

47. The categories of land termed "historic" herein include numerous farm fields, many a part of federal irrigation projects long established, that are rich and productive and have been the basis of agricultural life of the Reservation for decades. It would be unreasonable to require an economic analysis or benefit/cost ratios on these lands. The presumption of irrigability regarding these lands was fair and all parties understood it.

48. There are certain adjudicated historic areas in which the testimony presented by experts for Wyoming succeeded in rebutting the presumption of practicably irrigable acreage, and totals have been reduced accordingly.

49. The United States and Tribes seek a reserved water right for land known as the Arapahoe Ranch and the Padlock Ranch. The reserved right priority date

sought is the date of acquisition of these lands. All these parcels of land are outside of the stipulated Reservation boundaries. There is no evidence of a Congressional Act or Executive Order establishing a reservation of the lands of the Arapahoe Ranch and the Padlock Ranch purchases.

50. The United States and the Tribes claim an overall total of 71,619 acres of land as the measure of reserved water, for a total annual diversion of 420,462 acre-feet of water. Of these acres, 1,841.1 were of a class determined by United States' experts to be economically infeasible because of failure to meet size or arability standards, and 21 acres were of a class determined by United States expert Dornbusch to be economically infeasible. United States' experts found 882.8 acres Type IX, or "out" land; 884.6 acres Type VII, or "idle" land; 6,281.2 acres Class 6 land; and 1,778 acres subirrigated land, all nonarable by their standards, and their logs noted various reasons for the non-arability of another 1,588.8 acres. Ten acres are owned by non-Indians. State expert Sommers noted ten acres of adjudicated land on Dinwoody Canal that are more properly typed "VIII". Tribal expert Higginson determined 3,943 acres of Indian fee land to be "potentially irrigable", but insufficient showing was made that comparable acreage had been successfully irrigated. Deleting those 17,240.5 acres from the claim leaves 54,389 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands, an average water duty of 4.45 acre-feet per acre to Type VIII lands, and an average water duty of 4.57 acre-feet per acre to Indian owned lands, equals an award of 288,355 acre-feet of water diverted annually from both the project canals and the non-project river basins.

Future Lands

51. A land classification and drainage investigation was conducted on the Wind River Indian Reservation by HKM Associates on undeveloped future lands under the direction and control of A.T. Kersich. Mr. Kersich is President of HKM and principal in charge of its water resources section. He has had considerable experience in arable land studies on other Indian reservations and testified as a similar project leader and expert witness for the United States in *Arizona v. California*, where his testimony formed one basis for the Master's opinion.

52. The "future" lands lie outside the boundaries of the Wind River Federal Irrigation Project, the Midvale Irrigation District and the LeClair Irrigation District Project, and have no history of irrigation. They are all located within the stipulated boundaries of the Wind River Indian Reservation.

53. One definition of PIA (practicably irrigable acres) was stipulated to by the United States, the Tribes and the State of Wyoming as "those acres susceptible to sustained irrigation at reasonable costs".

54. The Tribes contended that a valid second test for practicably irrigable acreage is whether the lands in question and the proposed irrigation projects are similar to other lands and projects actually in operation in the West which have sustained long term irrigation. In considering the five future project areas presented by the United States, the Master did not use the second PIA test proposed by the Tribes. He concluded the arability, irrigability, and economic via benefit-cost analysis, was a much stronger test.

55. The land classification and drainage study conducted by the United States included soil analysis, drainage investigation, topographical and geological considerations, climate data, water availability determination, cropping patterns, and irrigation system designs. The

land classification standards developed were applied both to lands susceptible of gravity irrigation and to lands capable of sprinkler irrigation.

56. "Arable lands" are those lands which are capable of sustained irrigation or which can sustain long-term irrigation.

57. The United States relied upon facts and data from the Bureau of Indian Affairs, the Bureau of Reclamation (also known as the Water and Power Resources Services), and the Soil Conservation Service, as well as new data compiled by its experts, in presenting its arability determination.

58. The United States' experts developed six study areas for its land classification consisting of approximately 490,000 acres.

59. The preliminary land classification study analyzed the land capability criteria of depth to barrier, water holding capacity, permeability, slope and texture to establish the study areas.

60. The United States classified the lands in the six study areas into six classes, segregating lands with similar characteristics into the same class with a reasonable degree of consistency and objectivity.

61. Factors considered by the United States in its land classification include soil texture, depth, moisture retention, alkalinity, salinity, surface gravel and cobble, slope, irrigation pattern and field size, level of the surface, surface cover, drainage, hydraulic conductivity and soil depth to barrier.

62. The United States' classification relied on land classifiers who augured and logged 197 borings between 5 and 10 feet deep and 357 borings of 5 feet or less, dug 9 backhoe pits, drilled and logged 117 deep roles, analyzed samples from 165 holes for soil chemistry, and ran 11 infiltration and 22 hydraulic conductivity tests.

63. Experts for the State of Wyoming reviewed the HKM data, but spent limited time in the field. The thrust of their testimony was to question the amount of arable land HKM identified. Mr. Fowkes' testimony was general in nature, and he presented no acreage totals he felt should be deleted from those identified as arable by HKM.

64. Some degree of error ineviably exists whenever a group of land classifiers are required to coordinate and analyze such a complex area as the Wind River Indian Reservation, relying on a field of expertise which, by its nature, lacks the certainty of mathematical perfection or objectivity.

65. Ten to fifteen percent is an appropriate reduction of the classified lands of the United States to account for the error and inaccuracy described above.

66. The following acreage totals satisfy arable land base determination for future projects:

Areas	Acres
North Crowheart	43,089
South Crowheart	7,187
Big Horn Flats	17,681
Riverton East	4,223
Owl Creek	223
Arapahoe	3,614
	76,017

67. Dr. Mesghinna of Stetson Engineers testified for the United States on engineering feasibility. The Tribes offered additional evidence from Keller Engineers and the State of Wyoming relying on the testimony from Banner and Associates.

68. The testimony of Dr. Mesghinna on the factors relating to engineering feasibility was a thorough, professional presentation and analysis of the subject. He is supervising engineer for Stetson Engineers, specializing

in irrigation systems design, drainage and hydrology. He is a well qualified expert in irrigation system design and engineering, irrigation construction costs, drainage and water requirements.

69. The Federal parties' testimony on elevation distinctions, cropping patterns, water availability, soil characteristics, market factors and other product transportation, was reasonable and persuasive.

70. The calculations by Dr. Mesghinna of the net irrigation requirement, costs and designs for the one-farm system, the pipe network, pumps and pumping plants, canals and related structures, drainage, and operation and maintenance are reasonable and supported by a preponderance of the evidence.

71. Dr. Mesghinna's conclusions on engineering feasibility are supported by a preponderance of the evidence.

72. Dr. Mesghinna's acreage totals must be reduced to reflect the reduction made in the arable land base determination of HKM but to account for the 5% reduction already made by him in his analysis.

73. The following acreage totals satisfy the engineering feasibility determination for the future projects:

Areas	Acres
North Crowheart	34,993
South Crowheart	4,238
Arapahoe	3,437
Riverton East	3,442
Big Horn Flats	2,410
	48,520

74. In his determination of diversion requirements, Dr. Mesghinna considered average wind velocity, water holding capacity, cropping patterns, root depths, type of delivery and conveyance systems planned, source of water,

conveyance distance, amount and velocity of water in the canals, efficiencies and management techniques.

75. The United States claimed a total diversion requirement of 209,372 acre-feet while the State of Wyoming claimed it should not exceed 180,424.3 acre-feet.

76. The total diversion requirement must still be reduced by the 10% factor for error and inaccuracy from the arable land base. Thus, the total diversion for each of the future projects is as follows:

Project	Total Diversion (acre-feet/year)
North Crowheart	133,324
South Crowheart	18,181
Arapahoe	15,088
Riverton East	15,837
Big Horn Flats	6,507
Total	188,937

77. The United States, through testimony of Mr. Dornbusch, presented an economic feasibility analysis for the "at a reasonable cost" aspect of the practicably irrigable acreage test. Mr. Dornbusch is both a graduate engineer and an economist. He is experienced in feasibility studies for irrigated agriculture and other agricultural industries. He has performed large scale agricultural feasibility studies both in this country and abroad.

78. The State of Wyoming used the benefit-cost ratio approach, but maintained that none of the future projects would be economically feasible.

79. Dr. James Jacobs, for the State of Wyoming, performed an economic analysis of the projects. Dr. Jacobs is a professor of agricultural economics at the University of Wyoming. His experience has been primarily with the economic effect of varying agricultural practices. He has had experience with crop budgets.

80. The cropping patterns developed by Mr. Dornbusch from a variety of sources were reasonable and supported by a preponderance of the evidence. His crop yields were suported by a variety of sources in the evidence and were reasonable, as were his crop prices.

81. The determination by the experts for the State of Wyoming of production costs based on a 320 acre farming unit is unrealistic in light of the proposed future projects, and unreasonably inflates the production cost estimate.

82. Mr. Dornbusch's approach to estimating prices, useful life and hours of use for the farm machinery was reasonable and supported by the evidence.

83. Mr. Dornbusch analyzed the employment outlook for Indians on the Wind River Indian Reservation and concluded some opportunity costs for labor and management could be reduced or eliminated given the historically high rate of unemployment on the Reservation. His position was supported by the evidence.

84. The incremental, or ten year phase-in of management personnel from the Indian labor force by Mr. Dornbusch is reasonable and supported by the evidence.

85. The normalization factor used by Mr. Dornbusch for prices and costs is supported by the evidence and is representative of current practices.

86. The United States, the State of Wyoming, and the Tribes all presented experts and testimony on the appropriate discount rate to use in the economic feasibility analysis.

87. In determining the appropriate discount rate, the relevant considerations are the opportunity cost of capital displaced from investment and consumption in the long term and social time preference.

88. Mr. Dornbusch for the United States selected a range of two to four percent as the correct discount rate.

He used four percent as a conservative figure in his analysis.

89. Dr. Stephen Goldfeld, a witness for the United States, testified that an appropriate range would be from one to four percent, with two and one-half as a single rate to use. Dr. Goldfeld is the head of the Department of Economics at Princeton University and has served on the staff and as an appointed member of the President's Council of Economic Advisors. He is an expert on real rates of interest and costs of capital.

90. Dr. David Brookshire for the State of Wyoming testified that a range of four to eleven percent should be used and that no single rate should be selected.

91. Dr. Ronald Cummings for the Tribes questioned whether discounting was necessarily proper in evaluating the future needs of the Wind River Indian Reservation, but concluded that he would select a range of two to four percent as appropriate.

92. The preponderance of the evidence clearly supports as reasonable, the discount rate of four percent interest used by the United States in its economic analysis.

93. Mr. Dornbusch concluded, after applying a four percent discount rate in his feasibility study, that the five projects designed by Dr. Mesghinna were economically feasible. He provided the following benefit-cost figures:

Project	B-C Ratio
North Crowheart	1.47
South Crowheart	1.29
Big Horn Flats	1.07
Riverton East	1.25
Arapahoe	1.53

94. Dr. Goldfeld's analysis of the Fraumeni-Jorgenson article, "Rates of Return by Industrial Section in the United States, 1948-76", and his position on oppor-

tunity cost of capital was persuasive and is supported by the evidence.

95. A conclusion of an economic or sensitivity analysis on the Wind River Indian Reservation, that none of the proposed future project lands are economically feasible is refuted by the evidence of the case and is contrary to the conditions of the Reservation that it lacks any probative value.

96. Mr. Willard Wilson, Chairman of the Board of a bank in Thermopolis, testified that an appropriate net, inflation-proof profit margin would be one-half to three percent in banking, which is financial analysis evidence that supports in part the above findings.

97. Future lands found to be practicably irrigable and therefore deserving of an award of a reserved water right as listed are as follows:

Project	Acreage	Unit Diversion (acre-feet/acre)	Total Diversion (acre-feet/acre)
North Crowheart	34,993	3.81	133,324
South Crowheart	4,238	4.29	18,181
Araphaoe	3,437	4.39	15,088
Riverton East	3,442	4.60	15,837
Big Horn Flats	2,410	2.70	6,507
Total	48,520		188,937

98. The Court finds that the construction of any one or all of the future projects would have an adverse effect on other water users.

99. The Tribes presented the testimony of Lyman Willardson, Ronald Bliesner and Jack Keller in support of their claim for additional practicably irrigable acreage on Stagner Ridge and additional acreage in Big Horn Flats.

100. The Tribal testimony showed that the Stetson conceptual irrigation plan was too elaborate and too costly.

101. The analysis performed by Dr. Willardson was cursory and a very small amount of time was actually spent in field investigation.

102. Experts for the United States, both Stetson Engineers and Dornbusch and Company, also evaluated the additional future acreage and excluded it from their final totals.

103. The Tribes claimed that the additional future lands would be economically feasible by reducing the planned drainage of Dr. Mesghinna and passing that cost savings to the additional acreage.

104. The drainage plan proposed by Stetson is reasonable and any reduction in it jeopardizes the chance for proper drainage of the proposed projects.

105. The additional claims for future acreage on Stagner Ridge and Big Horn Flats Extension must be denied because they fail to meet the test of practicably irrigable acreage and do not meet the burden of proof, generally, from the evidence.

Other Findings

106. Many settlers who applied for and received early permits labored for years to perfect their ditch work and diversions into adjudicated certificates to assure a source of water.

107. The Homestead Act of 1862, expanded in 1916 to include grazing lands, set out conditions for settlement of unappropriated public lands in the Rocky Mountain West. As a result of this legislation, over 132,898 acres in Water Division 3 were settled by non-Indians between 1890 and 1920.

108. By the Desert Lands Act of 1873, Congress recognized that water was necessary for the successful set-

tlement of arid western lands and asserted to the doctrine of prior appropriation. As a result of this Act, approximately 23,590 acres in Water Division 3 were settled by non-Indians between 1916 and 1925.

109. Congress, in the Carey Act of 1894, again recognized the prior appropriation doctrine, the importance of water, and the necessity of irrigation for the successful development of arid lands. That Act outlined a disposal policy which resulted in the additional settlement by non-Indians of approximately 75,111 acres of Water Division 3.

110. The Reclamation Act of 1902 further recognized the necessity of water for settlement in the West. It stated that any project authorized under the Act was to proceed in recognition of state water rights laws. In Water Division 3, over 23,000 acres were deeded to non-Indians under this Act.

111. Approximately 255,000 acres in Water Division 3 were settled by non-Indians as a result of the Homestead Act of 1862, expanded in 1916, the Desert Lands Act of 1873, the Carey Act of 1894, and the Reclamation Act of 1902.

112. Some 9,000 defendants are on record as holders of approximately 25,000 adjudicated certificates.

113. Evidence presented in the case is insufficient to support any award of a reserved right for "Fishery flows" for the Wind River Indian Reservation.

114. Evidence is insufficient to support any award of a reserved right for aesthetics and wildlife for the Wind River Indian Reservation.

115. Evidence is insufficient to support an award of a reserved right for industrial or mineral development.

116. Insofar as the Reservation is entitled to a reserved right for agricultural purposes, domestic uses are subsumed within that right.

117. To the extent that an agricultural reserved right exists for the Reservation, it includes stockwatering or livestock as a related use.

118. Neither federal law nor Wyoming law provides any basis for the proposition that the Arapahoe and Shoshone Tribes own the underground water beneath the Wind River Indian Reservation. The United States Supreme Court has expressly refused to extend the reserved right doctrine to include underground water. The State of Wyoming applied the doctrine of prior appropriation to the State's underground water. Ownership of overlying land carries with it no right to underground water.

119. There exists no method other than appropriation by which a right to underground water may be obtained in Wyoming. Ownership of overlying land, water, or any other element has never been the basis of underground water rights. Because the reserved right doctrine does not apply to underground water, the Tribes must acquire rights to groundwater under Wyoming law.

120. The Court finds that during the years the Tribes have used both surface and groundwater for purposes of agriculture, livestock, domestic, municipal, mineral and industrial.

121. While he did not address administration directly, the Special Master did provide in his recommended decree that the State Engineer should have the right to monitor diversions for irrigation and stock watering.

122. The Court finds that effective administration of both Indian and non-Indian and federal and state-awarded water rights requires a single administrative

system and agency. A nonunified and inconsistent dual system of administering federal and state-awarded water rights would introduce inefficiency and uncertainty to the detriment of all water users and contrary to the legislative intent that led to the enactment of the McCarran Amendment, 43 U.S.C. #666, and Wyoming's general stream adjudication statute, Wyo. Stat. #1-37-106.

123. The Court finds that the State Engineer has responsibility for the administration of all state-awarded water rights in Division 3 as well as the Indian and Federal non-Indian water rights.

124. The Court finds there are many tracts of land on which the United States holds state water permits and on which there exist reserved water rights.

Conclusions of Law

1. The Court has jurisdiction over the subject matter of this general adjudication pursuant to W.S. Section 1-37-106.

2. The sole purpose behind the creation of the Wind River Indian Reservation was agricultural, which included related uses, domestic and livestock.

3. At the creation of the Wind River Reservation by the Treaty of Ft. Bridger on July 3, 1868, a reservation reserved water right vested with a priority date of July 3, 1868 for the sole purpose of agriculture and related uses, domestic and livestock.

4. That a reservation reserved water right does not exist in favor of the United States nor Tribes for the purpose of any of the following uses: industrial, mineral, municipal, fisheries, wildlife or aesthetics.

5. In view of the purpose of the Wind River Indian Reservation being solely agricultural, the only reserved water rights that could be granted or quan-

tified for the future projects would be to irrigate the practicably irrigable acreage on the said reservation.

6. All lands that have been sold out of Indian ownership but have been reacquired and are presently held in trust by the United States for the Tribes or members of the Tribes of the Wind River Indian Reservation have a reserved water right with a priority of the date of either the date sold out of Indian ownership or the date of a state water right, whichever is earlier.

7. Neither the United States nor the Tribes are entitled to a reservation reserved water right for those lands outside of the stipulated boundaries of the Wind River Indian Reservation known as the Arapahoe Ranch and the Padlock Ranch that have been purchased and are held in trust by the United States for the Shoshone and Arapahoe Indians.

   The Court holds that the Tribes are entitled to a water right as of the date of the applicable state permits, but the confirmation of the state water permits owned by the Tribes which apply to these said lands will be considered in the third phase of this case.

8. Neither federal law nor Wyoming law provides any basis for the proposition that the Arapahoe and Shoshone Tribes own the underground water beneath the Wind River Indian Reservation. The United States Supreme Court has expressly refused to extend the reserved right doctrine to include underground water. The State of Wyoming applied the doctrine of prior appropriation to the State's underground water. Just as in the case of surface water, the right to use underground water is acquired solely by placing water to beneficial use. Ownership of overlying land carries with it no right to underground water. There exists no method other than appropriation by which

a right to underground water may be obtained in Wyoming. Ownership of overlying land, water, or any other element has never been the basis of underground water rights. Because the reserved right doctrine does not apply to underground water, the Tribes must acquire rights to groundwater under Wyoming law.

9. The doctrine of equitable estoppel is applicable against the United States on behalf of the Tribes on the matter of the construction of the five awarded future projects.

10. There are many tracts of land on which there exist reserved water rights as well as some State certified rights with the associated priority dates. The United States and the Tribes lay claim to both water rights. The Court concludes that the United States and the Tribes are entitled to only one water right on the same land and that all State water permits which have later priority dates than the Court awarded reserved water rights covering the same lands should be cancelled.

11. The Court cannot dictate to the Tribes how they must use water that comes under a reserved water right but the Court can restrict any use of said water to within the boundaries of the reservation.

12. The Tribes can sell or lease any part of the water covered by their reserved water rights but the said sale or lease cannot be for exportation off of the Reservation.

13. The Tribes are entitled to continue the use of such amounts of surface and groundwater which are not covered by reservation reserved rights but only so long as the present uses are continued.

14. There being an overriding need for unified administration of water rights in Division 3, the State Engineer should administer the judgment under the currently existing system of water administration.

Judgment and Decree

NOW THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, the Court approves and ADOPTS the Special Master's Report, except as inconsistent with this Decision; it is hereby ORDERED, ADJUDGED and DECREED that:

1. The United States has reserved, by virtue of the Treaty of Fort Bridger, July 3, 1868, and for the benefit of the Shoshone and Arapahoe Tribes of the Wind River Reservation, the right to divert water, or to have water diverted, in the amounts set forth herein, and from the streams set forth herein, and that said right has a priority date of July 3, 1868.

Description/Source	Awarded Measure In Acres	Awarded Annual Diversion In Acre-Feet
PROJECT LANDS—HISTORIC (does not include Indian fee owned land)		
WIND RIVER FEDERAL IRRIGATION PROJECT		
Little Wind Unit:		
Ray Canal	8,728	40,573
Coolidge Canal	6,425	27,880
Sub Agency Canal	2,958	13,730
Subtotal	18,111	82,183
Upper Wind Unit:		
(unspecified)	492	2,056
Wind River "A" Canal	944	9,959
Dinwoody Canal	4,716	49,754
Subtotal	6,152	61,769
Johnstown Unit:	667	3,837
Lefthand Unit:	1,205	7,267
MIDVALE IRRIGATION DISTRICT:	561	2,738
RIVERTON-LECLAIR IRRIGATION DISTRICT:	1,066	5,117
PROJECT LANDS SUBTOTAL	27,762	162,911

Description/Source	Awarded Measure In Acres	Awarded Annual Diversion In Acre-Feet
NON-PROJECT LANDS—HISTORIC (including all Indian owned fee lands awarded)		
WIND RIVER BASIN		
East Fork Wind River	32	141
Dinwoody Creek	134	649
Sand Draw	—0—	—0—
Dry Creek	1,273	5,584
Bull Lake Creek	63	296
Meadow Creek	680	3,125
Dry Pasup Creek	1,550	7,179
Crow Creek	2,505	11,646
Willow Creek	194	876
Main Stem Wind River	4,442	20,842
Subtotal	10,873	50,338
LITTLE WIND RIVER BASIN		
North Fork Little Wind River	1,712	7,961
South Fork Little Wind River	1,113	5,085
Main Stem Little Wind River	1,620	8,177
Mill Creek	28	136
Sage Creek	1,797	8,686
Crooked Creek	69	317
Trout Creek	228	1,088
Spring Creek	178	773
Bighorn Draw	139	600
Subtotal	6,884	32,823
BIG HORN RIVER BASIN		
Main Stem Bighorn River	54	280
Cottonwood Creek	689	3,548
Fivemile Creek	423	2,055
Muddy Creek	3,293	15,819
Dry Muddy Creek	—0—	—0—
Maverick Springs Draw	—0—	—0—
Roundup or Warm Springs	35	153
Subtotal	4,494	21,855

Description/Source	Awarded Measure In Acres	Awarded Annual Diversion In Acre-Feet
POPO AGIE RIVER BASIN		
North Fork Popo Agie River	472	2,231
Main Stem Popo Agie River	71	347
Subtotal	543	2,578
OWL CREEK BASIN		
South Fork Owl Creek	998	4,455
Main Stem Owl Creek	2,069	9,775
Mud Creek	766	3,620
Red Creek	—0—	—0—
Subtotal	3,833	17,850
NON PROJECT LANDS SUBTOTAL	26,627	125,444
PROJECT LANDS SUBTOTAL	27,762	162,911
TOTAL HISTORIC PROJECT AND NON-PROJECT LANDS	54,389	288,355

2. The United States has reserved, by virtue of the Treaty of Fort Bridger, July 3, 1868, and for the benefit of the Shoshone and Arapahoe Tribes of the Wind River Reservation, the right to divert water, or to have water diverted, in the amounts set forth herein, for the five awarded future projects, provided that before construction can begin on any one of the said five projects, upstream storage has to be in place in order to replace the awarded annual acre-feet diversion for that project. The said right has a priority date of July 3, 1868.

Future Projects	Awarded Measure In Acres	Awarded Annual Diversion In Acre-Feet
North Crowheart	34,993	133,324
South Crowheart	4,238	18,181
Arapahoe	3,437	15,088
Riverton East	3,442	15,837
Big Horn Flats	2,410	6,507
TOTAL FUTURE PROJECTS	48,520	188,937

3. It might be that lands included in Paragraphs one (1) and two (2) above, contain some reacquired land, which has a priority date of whichever is earlier: when the land left Indian ownership and was purchased by a non-Indian or the date of the applicable state water permit. If from the records, an accurate determination of the reacquired lands cannot be made, then the major parties will stipulate such determination, and in the event the stipulation cannot be reached, then further hearings will be held in order to effect such determination.

4. The sole purpose behind the creation of the Wind River Indian Reservation was agricultural, which included related uses, domestic and livestock.

5. That a reservation reserved water right does not exist in favor of the United States nor Tribes for the purpose of any of the following uses: industrial, mineral, municipal, fisheries, wildlife or aesthetics.

6. Neither the United States nor the Tribes are entitled to a reservation reserved water right for those lands outside of the stipulated boundaries of the Wind River Indian Reservation known as the Arapahoe Ranch and the Padlock Ranch that have been purchased and are held in trust by the United States for the Shoshone and Arapahoe Indians.

7. Neither the United States nor Tribes have a reservation reserved water right to groundwater.

8. The Tribes are entitled to make such use of the water covered by their reserved water rights they deem advisable but the use is confined to the reservation and in no event shall the consumptive use be increased.

9. The Tribes can sell or lease any part of the water covered by their reserved water rights but the said sale or lease cannot be for exportation off of the reservation and in no event shall the consumptive use be increased.

10. The Tribes are entitled to continue the use of such amounts of surface and groundwater which they are now using, and which are not covered by reserved rights but only so long as the present uses are continued, unless approval is obtained from the State Engineer's Office and in no event shall the consumptive use be increased.

11. All State water permits which have later priority dates than the Court awarded reserved water right dates and which cover the same tracts of land are hereby cancelled.

12. The water rights under this Decree shall in the first instance be administered by the Wyoming State Engineer in accordance with the terms set forth herein. Prior to seeking judicial enforcement of any right under this Decree, the United States shall first request the State Engineer to exercise his administrative authority.

13. The United States and Tribes shall install or cause to be installed such measuring devices for all water rights decreed herein as may be reasonably required by the State Engineer to administer such rights adequately in the same manner and to the same effect as may be required in the future of or imposed on any other water user under Wyoming law.

14. Pursuant to W.R.C.P. 54(b) the Court finds that there is no just reason for delay for entry of final judgment on the claims described herein, and therefore, ORDERS same.

DONE this 10th day of May, 1983.

/s/ Harold Joffe
HAROLD JOFFE
District Judge

APPENDIX A

TREATY WITH THE EASTERN BAND SHOSHONI AND BANNOCK, 1868.

Articles of a treaty made and concluded at Fort Bridger, Utah Territory, on the third day of July, in the year of our Lord one thousand eight hundred and sixty-eight, by and between the undersigned commissioners on the part of the United States, and the undersigned chiefs and head-men of and representing the Shoshonee (eastern band) and Bannack tribes of Indians, they being duly authorized to act in the premises:

ARTICLE 1. From this day forward peace between the parties to this treaty shall forever continue. The Government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they hereby pledge their honor to maintain it.

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs, at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also re-imburse the injured person for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, on proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to the laws; and in case they wilfully refuse so to do, the person injured shall be re-imbursed for his loss from the annuities or other moneys due or to become due to them

under this or other treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no such damages shall be adjusted and paid until thoroughly examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss while violating or because of his violating the provisions of this treaty or the laws of the United States, shall be reimbursed therefor.

ARTICLE 2. It is agreed that whenever the Bannacks desire a reservation to be set apart for their use, or whenever the President of the United States shall deem it advisable for them to be put upon a reservation, he shall cause a suitable one to be selected for them in their present country, which shall embrace reasonable portions of the "Port Neuf" and "Kansas Prairie" counties, and that, when this reservation is declared, the United States will secure to the Bannacks the same rights and privileges therein, and make the same and like expenditures therein for their benefit, except the agency house and residence of agent, in proportion to their numbers, as herein provided for the Shoshonee reservation. The United States further agrees that the following district of country, to wit: Commencing at the mouth of Owl Creek and running due south to the crest of the divide between the Sweetwater and Papo Agie Rivers; thence along the crest of said divide and the summit of Wind River Mountains to the longitude of North Fork of Wind River; thence due north to mouth of said North Fork and up its channel to a point twenty miles above its mouth; thence in a straight line to head-waters of Owl Creek and along middle of channel of Owl Creek to place of beginning, shall be and the same is set apart for the absolute and undisturbed use and occupation of the Shoshonee Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst

them; and the United States now solemnly agrees that no persons except those herein designated and authorized to do so, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth they will and do hereby relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid.

ARTICLE 3. The United States agree, at its own proper expense, to construct at a suitable point of the Shoshonee reservation a warehouse or store-room for the use of the agent in storing goods belonging to the Indians, to cost not exceeding two thousand dollars; an agency building for the residence of the agent, to cost not exceeding three thousand; a residence for the physician, to cost not more than two thousand dollars; and five other buildings, for a carpenter, farmer, blacksmith, miller, and engineer, each to cost not exceeding two thousand dollars; also a schoolhouse or mission building so soon as a sufficient number of children can be induced by the agent to attend school, which shall not cost exceeding twenty-five hundred dollars.

The United States agrees further to cause to be erected on said Shoshonee reservation, near the other buildings herein authorized, a good steam circular-saw mill, with a grist-mill and shingle-machine attached, the same to cost not more than eight thousand dollars.

ARTICLE 4. The Indians herein named agree, when the agency house and other buildings shall be constructed on their reservations named they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right to hunt on the unoccupied lands as of the United States so long as game may be found thereon, and so long as peace

subsists among the whites and Indians on the borders of the hunting districts.

ARTICLE 5. The United States agrees that the agent for said Indians shall in the future make his home at the agency building on the Shoshonee reservation, but shall direct and supervise affairs at the Bannack reservation; and shall keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by and against the Indians as may be presented for investigation under the provisions of their treaty stipulations, as also for the faithful discharge of other duties enjoined by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

ARTICLE 6. If any individual belonging to said tribes of Indians, or legally incorported with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within the reservation of his tribe, not exceeding three hundred and twenty acres in extent, which tract so selected, certified, and recorded in the "land-book," as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above described. For each tract of land so selected a certificate, containing a description thereof, and the name of the person selecting it, with a certificate indorsed thereon that the same has been recorded, shall

be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office subject to inspection, which said book shall be known as the "Shoshone (eastern band) and Bannack land-book."

The President may at any time order a survey of these reservations, and when so surveyed Congress shall provide for protecting the rights of the Indian settlers in these improvements, and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property as between Indians, and on all subjects connected with the government of the Indians on said reservations, and the internal police thereof, as may be thought proper.

ARTICLE 7. In order to insure the civilization of the tribes entering into this treaty, the necessity of education is admitted, especially of such of them as are or may be settled on said agricultural reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for twenty years.

ARTICLE 8. When the head of a family or lodge shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, in value one hundred dollars, and for each succeeding year he shall continue to farm,

for a period of three years more, he shall be entitled to receive seeds and implements as aforesaid in value twenty-five dollars per annum.

And it is further stipulated that such persons as commence farming shall receive instructions from the farmers herein provided for, and whenever more than one hundred persons on either reservation shall enter upon the cultivation of the soil, a second blacksmith shall be provided, with such iron, steel, and other material as may be required.

ARTICLE 9. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named, under any and all treaties heretofore made with them, the United States agrees to deliver at the agency-house on the reservation herein provided for, on the first day of September of each year, for thirty years, the following articles, to wit:

For each male person over fourteen years of age, a suit of good substantial woollen clothing, consisting of coat, hat, pantaloons, flannel shirt, and a pair of woollen socks; for each female over twelve years of age, a flannel skirt, or the goods necessary to make it, a pair of woollen hose, twelve yards of calico; and twelve yards of cotton domestics.

For the boys and girls under the ages named, such flannel and cotton goods as may be needed to make each a suit as aforesaid, together with a pair of woollen hose for each.

And in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based; and in addition to the clothing herein named, the sum of ten dollars shall be annually appropriated for each Indian roaming and twenty dollars for each Indian engaged in

agriculture, for a period of ten years, to be used by the Secretary of the Interior in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper. And if at any time within the ten years it shall appear that the amount of money needed for clothing under this article can be appropriated to better uses for the tribes herein named, Congress may by law change the appropriation to other purposes; but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named. And the President shall annually detail an officer of the Army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery.

ARTICLE 10. The United States hereby agrees to furnish annually to the Indians the physician, teachers, carpenter, miller, engineer, farmer, and blacksmith, as herein contemplated, and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior, as will be sufficient to employ such persons.

ARTICLE 11. No treaty for the cession of any portion of the reservations herein described which may be held in common shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive without his consent, any individual member of the tribe of his right to any tract of land selected by him, as provided in Article 6 of this treaty.

ARTICLE 12. It is agreed that the sum of five hundred dollars annually, for three years from the date when they commence to cultivate a farm, shall be expended in presents to the ten persons of said tribe who, in the judg-

ment of the agent, may grow the most valuable crops for the respective year.

ARTICLE 13. It is further agreed that until such time as the agency-buildings are established on the Shoshonee reservation, their agent shall reside at Fort Bridger, U. T., and their annuities shall be delivered to them at the same place in June of each year.

N. G. Taylor, [SEAL]
W. T. Sherman, [SEAL]
Lieutenant-General
Wm. S. Harney, [SEAL]
John B. Sanborn, [SEAL]
S. F. Tappan, [SEAL]
C. C. Augur, [SEAL]
Brevet Major-General, U.S. Army, Commissioners.
Alfred H. Terry, [SEAL]
Brigadier-General and Brevet Major-General, U.S. Army.

Attest:

A. S. H. White, Secretary.

Shoshones:

Wash-a-kie, his x mark.
Wau-ny-pits, his x mark.
Toop-se-po-wot, his x mark.
Nar-kok, his x mark.
Taboonshe-ya, his x mark.
Bazeel, his x mark.
Pan-to-she-ga, his x mark.
Ninny-Bitse, his x mark.

Bannacks:

Tagee, his x mark.
Tay-to-ba, his x mark.
We-rat-ze-won-a-gen, his x mark.
Coo-sha-gan, his x mark.
Pan-sook-a-motse, his x mark.
A-wite-etse, his x mark.

Witnesses:

Henry A. Morrow,
Lieutenant-Colonel Thirty-sixth Infantry and
Brevet Colonel U.S. Army,
Commanding Fort Bridger.
Luther Manpa, United States Indian agent.
W. A. Carter.
J. Van Allen Carter, interpreter.

APPENDIX G

IN THE DISTRICT COURT
OF THE FIFTH JUDICIAL DISTRICT
STATE OF WYOMING

Civil No. 4993

IN RE: THE GENERAL ADJUDICATION
OF ALL RIGHTS TO USE WATER IN THE
BIG HORN RIVER SYSTEM AND ALL
OTHER SOURCES,
STATE OF WYOMING.

Teno Roncalio, Special Master

SUPPLEMENTAL AND FINAL REPORT

CONCERNING:

I. The Claims of Certain Defendants based on Reacquired Indian Allotment Land

II. The Disposition of Expired Permits

III. The Confirming of Adjudicated Certificates

JUNE 1, 1984

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PART I

THE CLAIMS OF CERTAIN DEFENDANTS BASED ON REACQUIRED ALLOTMENT LAND

A. INTRODUCTORY STATEMENT

This Supplemental Report concerns that portion of the general adjudication of all of the rights to use water in the Big Horn River System and all other sources dealing with claims of certain non-Indian parties for water rights based on the purchase of land by a non-Indian from an Indian allottee, or successor, which land was originally a part of the Wind River Indian Reservation. These claims have a variety of legal basis. For convenience sake, and without attaching legal signifiance, there are treated herein as "Walton rights", and include those claims seeking a 1905 State Permit as well as those which claim a purchased reserved right dating from 1868, the date of the Wind River Indian Reservation.

Part I is limited to a discussion of these claims. It augments the December 15, 1982 Report Concerning Reserved Water Right Claims By and On Behalf of The Tribes of the Wind River Indian Reservation, Wyoming. It is not intended to amend or alter any portion of that Report, or to reconsider any of the subject matter contained therein. It is controlled by the May 10, 1983 decision of Judge Joffe.

This Supplemental and Final Report was delayed for nearly eighteen months pending Wyoming's proposal for the handling of the third and final phase of this adjudication, i.e. how to dispose of the approximately 7,000 expired permits on record in the office of the State Engineer. Early in 1983, Wyoming announced a process that notice would be given before cancellations would be in effect of these expired permits. To the best of my knowledge, such a plan may be in operation at this time and I will address that final portion of the adjudication in Part II of this Report.

B. PROCEDURAL HISTORY

This general adjudication began on January 24, 1977 when the State of Wyoming filed its complaint in the Fifth Judicial District Court at Worland, Wyoming. In response, many defendants filed answers claiming reserved water rights as non-Indian owners of lands originally allotted to tribal members. These claimants, relying on *Colville Confederated Tribes v. Walton*,[1] sought a priority date of 1868 for their irrigated lands. Near the conclusion of the hearings regarding the claims for the Wind River Indian Reservation, some evidence was heard regarding the non-Indian successors' claims and a decision was made to hold further evidentiary hearings. These were held January 25 and 26, 1983, in Lander, Wyoming.

When the hearings were completed, the State of Wyoming filed objections to documentary evidence submitted during the hearings. A memorandum opinion was issued on April 5, 1983, wherein these objections were examined and overruled. Subsequently, proposed findings of fact, conclusions of law and decrees were submitted by the various interested parties.

The claimants were not required to submit formal statements. Attorneys for the claimants, particularly Mr. Sky Phifer, submitted exhibits which set forth the names of the claimants and legal descriptions of lands.

C. HISTORY OF "WALTON RIGHT" CLAIMS

As alluded to briefly above, the individuals claiming a right to water are non-Indian successors in interest to land which was once owned by an Indian and was a part of the Wind River Indian Reservation. Although originally held in trust for the Tribes, certain land within the reservation became the property of individual Indians

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[1] *Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320 (1978), 647 F.2d 42 (9th Cir. 1981).

pursuant to the General Allotment Act of 1887, 24 Stat. 388. Once all the provisions of that Act were met, a patent would often issue to the Indian allottee. From that point on, the land would be considered the property of the allottee and the allottee would treat that particular allotment of real property as any other land owner, which included the right to convey in fee, lease, encumber or make other legal disposition.

The sale of allotted land to a non-Indian raises this question: Does the sale also transfer enjoyment of the reserved water right held by the Indian allottee? The "Walton right" claim stems from that fact situation which was presented in United States District Court in Washington in the case of *Colville Confederated Tribes v. Walton*, 460 F.Supp. 1320 (1978). There, as in our situation, the claimant argued that the General Allotment Act passed to the individual Indian allottees a portion of the reservation's reserved water, which became appurtenant to the land and was conveyed to a non-Indian when the land was sold to a non-Indian. The trial court held that Walton was not entitled to share in the tribe's reserved water rights (*Walton I*). On appeal, that decision was reversed and the Ninth Circuit Court of Appeals held that Walton was entitled to his share of the reserved waters. *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (1981), (known as *Walton II*). The United States Supreme Court denied certiorari. 454 U.S. 1092 (1981). On remand, the trial court again calculated the respective rights of the parties. U.S. District Court, Eastern District of Washington, Memorandum Decision, filed August 31, 1983. This latter judgment is known as "Walton III", or the *third* Walton decision on this vexing issue.[2]

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[2] An indication of the growing disenchantment with water cases and an almost daming indictment of the Public Works project concept of attorneys involved in the water litigation can be gleaned from the following quotation from the last page of the Memorandum

In addition to the claim for a purchased reserved right date, the claimants in *Walton* and in this adjudication alternatively asked for a priority date for the lands irrigated as of the date of application to the state for a permit to use water. The Court of Appeals in *Walton II* [3] held that state has no power to regulate water in the system and that the permits are of no force and effect. Our situation differs in that some of the claimants here seek a priority date based on permit applications initiated by or on behalf of the Indian allottees. In general, the priority date sought here is 1905. These rights are also referred to as "purchased reserved rights".

It is necessary for a reader who would want to be thoroughly familiar with this problem to have access to my Report filed December 15, 1982, concerning reserved water right claims by and on behalf of the Wind River Indian Reservation, Wyoming.

In that report (page 44), there is the initial discussion of the reacquisition by a non-Indian entity and the ruling which denies treaty-date priority to any non-Indian or his successor. That finding and rule supports and sus-

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Decision of The Honorable Robert J. McNichols, United States District Judge in Spokane, in the completion of the *Walton III* decision:

> "Gratuitous though it may appear, this Court is of the opinion that no matter what result obtained when the final chapter of this litigation is at long last written, the parties are going to have to come to grips with the proposition that a spirit of cooperation may be the best answer to efficient and fair utilization of No Name Creek Basin. If the thrust and motivation underlying the instant lawsuit is merely to provide attorneys with the form for launching abstrouse forays into matters esoteric, then the entire project has been a phenominal success. On the other hand, if the purpose of this action is to provide each of the competing interests an equitable share and thereby promote maximum utilization of a limited resource for the mutual benefit of all concerned, a little more unity of purpose may be indicated."

[3] *Walton II*, 647 F.2d at p.51.

tains Wyoming law,[4] affirming that non-Indians who purchase from Indians do not receive superior rights stemming from the treaty.

It is the law of *Walton I*, and I have deliberately reviewed *Walton II* and *Walton III* and found nothing which would cause me to change this position.

In the Lander hearings, several of the defendants were represented somewhat as a class by Messrs. Michael Messinger and James Barrett. These took the "Landis Webber" position that each was entitled to an 1868 priority date by virtue of conveyances from Indian authority or from an actual Indian allottee.

Therefore, my first ruling of this phase II of the adjudication is to again assert that no evidence adduced either in the year-long hearings on the Indian claims or upon the Lander hearings of those claiming under *Walton* or purchased rights—no evidence adduced in either of these events—warrants any change of conclusion in this regard. The view that *Merrill v. Bishop* be not overturned has now been approved by Judge Joffe in his Decree of May 10, 1983, and I believe it will withstand the continued efforts of water users to seek a treaty-date priority. The recommended judgment herein will reflect this conclusion.

As to the remaining claimants, I treat each defendant chronologically and base all findings upon the evidence adduced at Lander. Most of these claimants were represented by Sky Phifer; a total of twenty-eight witnesses testified and some eighty exhibits were introduced. They are as follows:

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[4] *Merrill v. Bishop*, 74 Wyo. 298, 287 P.2d 620 (1955).

D. INDIVIDUAL CLAIMS

CLAIM NO. 1

CLAIMANT, RUDY AND NANCY ZUPENCE

Box 333, Ft. Washakie, Wyoming 82514

Acres claimed: 50

Acres awarded: 50

Acre-feet Per Year Awarded: 150

Priority Date: March 18, 1905

Township 1 South, Range 1 West of the W.R.M:

Section 5: NE¼SW¼, N½SE¼SW¼, W½SE¼SE¼SW¼

These lands receive water from the Ray Ditch, Lateral 2-C. The acreage lies south of the south fork of the Little Wind River. Present owners for thirteen years relied upon annual deliveries of water from the Bureau of Indian Affairs and paid annual maintenance and irrigation assessments to the Bureau of Indian Affairs for the water. There was no question about water rights in the mind of the Zupence's until the adjudication was filed by the State of Wyoming.

The land was acquired from predecessors who traced the chain of title to Frank Sorrell, the original Indian allottee. Acreage under irrigation totalled 50 acres; 30 acres of hay meadow and 20 acres of pasture. The evidence by several whose testimony can be considered expert in this regard establishes a water duty of an average of three acre-feet per year for the noted crops.

In this case, as in many to follow, the fact that the State of Wyoming acquiesced in delivery of water for so many years to the present claimants and their predeces-

sors, coupled with the fact that annual fees were received by the Bureau of Indian Affairs and the managers of this federal irrigation project for delivery of water, and that water was delivered, constitutes a sufficient finding for a conclusion of law that these claimants are entitled to a water permit for the delivery of 150 acre-feet per year delivered through the Ray Canal, with a priority date to be the identical date of the Federal Irrigation Project served by the Ray Ditch, i.e. March 18, 1905. Despite a conflict of evidence on what was the date of conveyance from the Tribes to Sorrell, the October 18, 1907 date was a date of first conveyance. It was noted again that Wyoming counsel made no objections regarding this evidence, nor presented evidence of their own, at the Lander hearings on this claim or on any of the others to follow.

CLAIM NO. 2

CLAIMANT, ALBERT HORNECKER

Route 61, Ethete, Wyoming

Acres claimed: 420.97

Acres awarded: 318.15

Acre-feet Per Year Awarded: 954.48

Priority Date: March 18, 1905

Parcel and Land Description [6]	Acreage	Award
Section 21: SW¼SW¼	38.85	116.55
Section 27: N½NW¼	64.25	192.75
Section 28: N½SE¼	77.75	233.25
Section 28: SW¼SE¼, SE¼SW¼	69.99	209.97
Section 29: SE¼SW¼	31.70	95.13
Section 32: NW¼NE¼	35.61	106.83
TOTALS	318.15	954.48

There was no evidence presented to rebutt Mr. Hornecker's testimony, nor was there cross-examination regarding exhibits introduced in this report. Wyoming did file, some months after the Lander hearing, proposed findings which assert that actual title transfer on some of the Hornecker tracts were not from the allottee, but from the United States. I find that if this is a fact, it nevertheless does not bear from the basic principle that these were allotment lands, were owned by non-Indians, received water for many years (to which witnesses concurred), and were acquired by the present claimant beginning with deeds dating in 1961. As such, they are as eligible for a water permit.

[6] All claims are in Township 1 South, Range 1 East of the Wind River Meridian.

Mr. Hornecker's acreage was broken down into eight parcels with some State permits expired on some, but not cancelled, and adjudicated permits in force on two parcels which, ironically, were the least attractive from an irrigability standpoint, D-7 and D-8 having adjudicated certificates upon them, had their acreage removed from this consideration.

All remaining six tracts are served by the Ray Canal and findings include that their crops patterns, water duty and priority date should apply as in Claim No. 1 herein, and the others similarly situated.

CLAIM NO. 3

CLAIMANT, CHARLES M. ROEMER

Box 563, Lander, Wyoming 82520

Acres claimed: 53

Acres awarded: 25

Acre-feet Per Year Awarded: 75

Priority Date: March 18, 1905

Township 1 South, Range 1 West of the W.R.M.

Section 5: S½NW¼SE¼, NW¼NW¼SE¼, SW¼SE¼

This land was purchased from Mr. Sorrell, the allottee, in 1954. I find the evidence presented by the claimant is sufficient to justify the award of a state water right for 25 of the claimed 53 acres. My reason for reducing acreage lies in the few and simple facts adduced upon cross-examination: that the Bureau of Indian Affairs in their 1981 assessments reduced the acreage of this claimant from 53 to 24 acres and made charges accordingly; and Mr. Roemer himself testified that his annual adjusted charges on the 24 acre assessment was $157.00 per year and that that is what he has been paying.

Duty on this acreage is similar to the prior claimants' and the resultant award should be for an annual volume of 75 acre-feet. It is served from the Ray Ditch.

The owner testified that this is flood irrigation for pasture only, and that he has never been denied water to irrigate "all I could reach. I've never had anybody tell me I couldn't irrigate the ground." [6]

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[6] Tr. p. 169.

CLAIM NO. 4

CLAIMANT, HOMER BLOMBERG, SR.

P.O. Box 229, Riverton, Wyoming 82501

Acres claimed: 15.47

Acres awarded: 15.00

Acre-feet Per Year Awarded: 45

Priority Date: March 18, 1905

Township 1 South, Range 4 East of the W.R.M.

Section 10: E½NW¼NW¼

Mr. Blomberg's evidence was more than adequate to establish a finding that the ownership of this land has been his for far beyond twenty-one years. It was purchased by him in 1937, is served by the Left Hand Canal of the Federal Irrigation Project, and he brings sufficient evidence of conveyance from a non-Indian in 1920 to predecessor in title.

For some reason the assessment figures in 1958 were changed from 15.47 to 15 acres and the finding will reflect that change.

The similar duty is three acre-feet per year. The award herein will be an award for 45 acre-feet per year.

CLAIM NO. 5

CLAIMANT, KENNETH AND GLADYS HANSEN

Box 55 Star Route, Arapahoe, Wyoming 82510

Total acres claimed: 152

Acres awarded: 152

Acre-feet Per Year Awarded: 456

Priority Date: March 18, 1905

C-1: *Township 1 South, Range 1 East of the W.R.M.*

Section 1: E½SE¼

Acres claimed: 42

C-2: *Township 1 South, Range 1 East of the W.R.M.*

Section 11: W½NW¼

Acres claimed: 71

C-3: *Township 1 South, Range 1 East of the W.R.M.*

Section 12: NW¼NE¼

Acres claimed: 39

Claimants testimony is sufficient to establish that all three of these parcels were one allotted and I find that the record is sufficient to prove claimants' title derived from an Indian allottee.

This claimant, as with the prior claims has established a sufficient record to warrant state water rights with similar priority date of those of other Federal Irrigation Projects to the total acreage of 152 acres as testified to by claimant. Lands are served by the Coolidge Ditch out of the Little Wind River.

CLAIM NO. 6

CLAIMANT, JAMES NIRIDER

Box 62, Arapahoe, Wyoming 82501

Total Acres claimed: 248.46

Acres awarded: 248.46

Acre-feet Per Year Awarded: 745.38

Priority Date: March 18, 1905

F-1: *Township 1 South, Range 1 East of the W.R.M.*

Section 2: E½SE¼, and SE½NE¼

Acres claimed: 72.0

F-2: *Township 1 South, Range 2 East of the W.R.M.*

Section 7: SE¼NW¼, and Lot 2

Acres claimed: 79.16

F-3: *Township 1 South, Range 1 East of the W.R.M.*

Section 35: E½SE¼

Acres claimed: 97.3

Mr. Nirider testified that he purchased certain parcels of his tracts as early as 1948. They were then fee land and he broke out the full eighty acres from sagebrush; his crops were alfalfa and small grain and some pasture; and he testified that it has been continuously irrigated since acquisition.

Remaining lands were purchased at a later date, all of which receive deliveries from the Coolidge Ditch.

Regular assessments were made and his water bill paid annually to the Bureau of Indian Affairs.

As with prior claims, the State maintains that a complete chain of title cannot be established for this land and that the courts should not verify current ownership because of the fact that there have been some voids between the evidence that the land was once allotted, but that actual title transfer to the non-Indian was not from the allottee but from the United States.

Once again I will assert that that does detract from the basic proposition that these were allotted lands, ultimately came into the ownership of non-Indians, and have been receiving water by payment for O&M therefor, delivered with acquiesence of the State Engineer, and by cooperation of the federal irrigation projects which operate under virtue of a State permit and that Wyoming's objections thereto are not sufficient to override the granting of a State awarded water right for these claimants.

Even the State of Wyoming Proof of Appropriation indicates a beneficial use of water was completed as early as 1916 on some portions of the Nirider property. Other documentary evidence supports that that particular sixty acres in the E½SE¼ were irrigated in 1921. So as with other claimants, the evidence here is found to be sufficient to justify the award.

CLAIM NO. 7

CLAIMANT, THOMAS REED

P.O. Box 45, Lander, Wyoming 82520

Total Acres claimed: 115 (170 less 55, G-1)

Acres awarded: 115

Acre-feet Per Year Awarded: 345

Priority Date: March 18, 1905

G-1: *Township 1 South, Range 1 East of the W.R.M.*

Section 15: S½NW¼

Acres claimed: 55

G-2: *Township 1 South, Range 1 East of the W.R.M.*

Section 22: S½NE¼

Acres claimed: 60

G-3: *Township 1 South, Range 1 East of the W.R.M.*

Section 22: N½NW¼

Acres claimed: 55

Mr. Reed testified that there is at present an adjudicated state water right on his tract known as G-1, which is 55 acres, so his total was reduced accordingly by 55 acres already under state adjudication. Some rights on other of his acreage expired or were cancelled in 1963, the record is unclear which.

It also shows that in G-2 of the 80 acres there, the claimant testified that it is "mostly swamp land. There's 4.4 acres of water billed on that." Wyoming urges that the 60 acre claim be reduced to 4.4 acres. I think not.

It is not necessarily true that he irrigates that particular tract on purpose. It being swamp land would indicate that nothing can be done about it, one way or the other.

All three parcels received BIA water through the Coolidge Ditch. Mr. Reed has pointed up one of the very real problems that should have been faced by Wyoming decades ago, but was left to be unravelled in this most awesome mainstream adjudication. This is simply the confusion that can ensure from an irrigation project of many tracts of lands, some owned by Indians and receiving 1868 water; some leased by Indians to non-Indians enjoying the 1868 water; said tracts being located near fee lands owned by non-Indians with a 1905 date on the same canal and the same times for irrigation. To quote Mr. Reed:

> "No, I don't think I need a 1905. I think I ought to have an 1868 water right on my three parcels. It comes down the ditch, you've got a checkerboard pattern, and I don't see how you can separate the water without it causing mass confusion. If you have a split deal on your water, you're short on water, like we are occasionally. You're going to have a piece of fee land that (sic) gonna have to wait until the 1868 priority is served, and, like I've got a lot of leased land that's going to get 1868 priority, and above me there's going to be somebody with fee land that, say, has a 1905 priority. And like last year, for instance, last spring our water came pretty late and it was pretty hard to get. There were a lot of people with real late water and they had a hell of a time, pardon my language. But if we run into that situation, which I'm sure we will, then I'm gonna be calling for that 1868 priority on leased land and I'm sure other people are going to be doing the same thing. And consequently, those people with fee land, including myself, we're going to have to

wait until everything else is served. And that situation there right now, that's not down the road ten years or a hundred years from now.

This reflects what has been asserted repeatedly by State experts that "strict supervision" will be necessary in Water Division 3, and I cannot depart from the general proposition that a purchased reversed right owner under *Walton* doctrines cannot acquire an 1868 date in Wyoming. For reasons stated and repeated in both the original Report filed December 15, 1982 and in this Supplemental Report, this 1905 date is applied.

CLAIM NO. 8

CLAIMANT, DONALD BATH;
DHB & CO., and PLB & CO.

Star Route, Box 95, Arapahoe, Wyoming 82510

Total Acres claimed: 492.95

Acres awarded: 459.70

Acre-feet Per Year Awarded: 1380

Priority Date: May 5, 1905

B-1: *Township 1 South, Range 3 East of the W.R.M.*

Section 13: E½NE¼

Acres claimed: 78.1

B-2: *Township 1 South, Range 3 East of the W.R.M.*

Section 14: E½NW¼

Acres claimed: 78.85

B-3: *Township 1 South, Range 3 East of the W.R.M.*

Section 14: SW¼NE¼ and NW¼SE¼

Acres claimed: 74.2

B-4: *Township 1 South, Range 3 East of the W.R.M.*

Section 14: SE¼NE¼ and NE¼SE¼

Acres claimed: 69.3

B-5: *Township 1 South, Range 3 East of the W.R.M.*

Section 15: N½NE¼

Acres claimed: 74.25

B-6: *Township 1 South, Range 3 East of the W.R.M.*

Section 16: SE¼NE½ (33.25 acres)
Section 21: E½NE¼ (25.00 acres)

Acres claimed: 58.25

B-7: *Township 1 South, Range 3 East of the W.R.M.*

Section 22: NW¼

Acres claimed: 60

The credible evidence is that Parcels B-1 and B-4 were purchased by the claimant from his father in 1978. Claimant's father purchased said parcels in 1962. Parcels B-5, B-2 and B-3 were purchased by claimant in 1960 from Mr. Vincent of Riverton, who in turn owned it since 1924. Parcels B-6 and B-7 were purchased by claimant in 1973 from Mr. Henry Bloom, Cheyenne, who had owned said parcels for 20 years.

These lands are served out of the Sub Agency. Claimant testifies that all acreage being claimed is irrigable except for where his house stands and except for easements and rights-of-way, and is currently being irrigated. Testimony indicates that these lands were irrigated prior to purchase except the 80 acres of Parcel B-6 and the 37.5 acres of Parcel B-7. Parcel B-6 had been irrigated at one time, but not when purchased. Ditches were already there and claimant leveled part of the parcel, began irrigating in 1973, is now irrigating about 25 acres.

Mr. Griffith testified that this land has been under irrigation as far back as 1920. I have accepted Mr. Bath's testimony that 60 acres are presently being irrigated in B-7 and based the award on that figure; and on 25 acres in B-6 because 33.25 acres in B-6 are under an existing adjudicated certificate.

CLAIM NO. 9

CLAIMANT, BRADFORD BATH

Star Route, Box 95, Arapahoe, Wyoming 82510

Total Acres claimed: 79.0

Acres awarded: 79.0

Acre-feet Per Year Awarded: 237

Priority Date: May 5, 1905

A-1: *Township 1 South, Range 3 East of the W.R.M.*

Section 14: W½SW¼ (except 2.76 acres)

Acres claimed: 79.0

Claimant purchased this land from Thorough Rounds in 1979, who purchased it from Alex Webber in 1947. It consists of 79 acres, all of which is currently irrigated. The testimony of claimant's father, Donald Bath, indicates this land was continuously irrigated since his son took possession and the family has lived there since 1956.

CLAIM NO. 10

CLAIMANT, ARTHUR AND WANDA LUCAS

Box 22, Star Route, Arapahoe, Wyoming 82510

Total Acres claimed: 31

Acres awarded: 31

Acre-feet Per Year Awarded: 93

Priority Date: May 5, 1905

O-1: *Township 1 South, Range 3 East of the W.R.M.*

Section 17: SW¼SE¼

Acres claimed: 19

O-2: *Township 1 South, Range 3 East of the W.R.M.*

Section 20: Westerly 990′ of E½NE¼

Acres claimed: 12

Both Parcels O-1 and O-2 are served by the Sub Agency Ditch.

Claimant irrigates and pays O&M on 19 acres of Parcel O-1 and irrigates and pays O&M on 12 acres of Parcel O-2. He testified that both parcels have been irrigated since 1940. Mr. Griffith also testified that this land has also been under irrigation as far back as 1920. Since nothing appears to indicate that any other of the Claimant's 99.15 acres in Section 17 was ever irrigated, only the O-1 acreage was considered.

CLAIM NO. 11

CLAIMANT, HENRY AND VIOLET LEWIS

Arapahoe Route, Box 3060, Riverton, Wyoming 82510

Total Acres claimed: 62

Acres awarded: 62

Acre-feet Per Year Awarded: 186

Priority Date: May 5, 1905

N-1: *Township 1 South, Range 3 East of the W.R.M.*

Section 12: E½SE¼

This acreage is currently served by the Sub Agency.

Mr. Lewis testified that his land (Parcel N-1) consists of a total of 80 acres, and he irrigates 62 acres. He has owned this land since 1940; has irrigated it every year thereafter; and has paid an assessment every year. He has grown beans, beats, hay, grain and corn on the land.

A corroborating witness (Mr. Griffin) testified that this land was owned by a Mr. Adams in 1920-25, and that approximately 65-70 acres was under irrigation at that time.

CLAIM NO. 12

CLAIMANT, GRIFFIN BROTHERS, INCORPORATED
by HERSCHEL GRIFFIN

Box 322, Riverton, Wyoming 82501

Total Acres claimed: 456

Acres awarded: 100

Acre-feet Per Year Awarded: 300

Priority Date: March 18, 1905

P-1: *Township 1 South, Range 3 East of the W.R.M.*

Section 1: S½ of Lot 1, SE¼NE¼, N½NE¼, N½NE¼SE¼

Acres claimed: 5

P-2: *Township 1 South, Range 3 East of the W.R.M.*

Section 1: SW¼NE¼, N½NW¼, SE¼, S½ of Lot 2 (NW¼NE¼)

Acres claimed: 10

P-3: *Township 1 South, Range 4 East of the W.R.M.*

Section 7: Lot 1 (NW¼NW¼), NE¼NW¼, NW¼NE¼

Acres claimed: 85

P-4: *Township 1 South, Range 4 East of the W.R.M.*

Section 16: Lot 3 (SW¼NW¼, W½SW¼)
Section 17: Lot 2, Lot 3, E½SE¼

Acres claimed: 170

P-5: *Township 1 South, Range 4 East of the W.R.M.*

Section 17: NE¼SE¼, NW¼SE¼

Acres claimed: 61

P-6: *Township 1 South, Range 4 East of the W.R.M.*

Section 17: SW¼SE¼
Section 20: NW¼NE¼

Acres claimed: 30

P-7: *Township 1 South, Range 4 East of the W.R.M.*

Section 19: SE¼NW¼, SW¼NE¼, NW¼SE¼, NE¼SE¼

Acres claimed: 95

Parcels P-1 and P-2 are currently irrigated for winter pasture, as land is seepy and the O&M assessment has been reduced. From the total 160 acres, claimant doubts if over 15 acres are assessed. The allottee for these parcels is unknown; however one Hamon Lacy purchased this land from the allottee and broke it out of sagebrush.

Claimant's father bought Parcel P-3 from the allottee in 1920 or 1919; broke out of sagebrush year after purchase and the land (85 acres) had been irrigated continuously since then.

The allottee of Parcel P-4 is unknown. Claimant purchased this parcel from P.J. O'Connor of Casper in 1947 and 170 acres has been under irrigation.

Parcel P-5 (61 acres) and Parcel P-6 (30 acres) was also purchased by Claimant from P.J. O'Connor in 1947.

Parcels P-1, P-2 and P-3 are serviced by the Sub Agency Ditch and the Left-Hand Ditch, and the Claimant pays assessment charges on these parcels. Parcels P-4, P-5, P-6 and P-7 are served by a private ditch called the Double Ditch. This private ditch was built by P.J. O'Connor in approximately 1925 and takes water from the Little Wind River below the Popo Agie, where they come together. Claimant testifies that irrigation started then. C.C. Barnes, previous owner of P-7, testifies that

he has been familiar with land since 1925 and that it has been under irrigation since then.

Double Ditch serves P-4 through P-7 on a "State permit" but these acres have been termed adjudicated acres. Therefore, the acreage of said tracts totaling 356 acres is deleted from an award herein. The claim for a 1868 date on this adjudicated certificate is denied, and the remaining 62 acres is awarded a 1905 date.

CLAIM NO. 13

CLAIMANT, DON VAN RIPER

Route 61, Box 63, Lander, Wyoming 82601

Total Acres claimed: 54

Acres awarded: 54

Acre-feet Per Year Awarded: 162

Priority Date: March 18, 1905

K-1: *Township 1 South, Range 2 East of the W.R.M.*

Section 6: Lot 4 ($NW\frac{1}{4}NW\frac{1}{4}$)
Lot 5 ($SW\frac{1}{4}NW\frac{1}{4}$)

This acreage (K-1) is served by Coolidge Ditch system.

Claimant has owned this acreage, consisting of a total of 80 acres, since 1964. He states that 54 acres are irrigable and have been continuously irrigated since he bought it in 1964. Claimant states that he pays O&M charges on 23 acres, but "there's another assessment that they haven't charged me for yet." [7]

This is sufficient evidence to award the right requested by Mr. Van Riper.

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[7] Tr. p. 282.

CLAIM NO. 14

CLAIMANT, RALPH AND EILEEN URBIGKIT

Crowheart, Wyoming 82512

Total Acres claimed: 325.7

Acres awarded: 325.7

Acre-feet Per Year Awarded: 977

Priority Date: April 27, 1905

I-1: *Township 4 North, Range 4 West of the W.R.M.*

Section 2: E½SW¼

I-2: *Township 4 North, Range 4 West of the W.R.M.*

Section 2: SW¼SW¼

Acres claimed, both I-1 and I-2: 96.3

I-3: *Township 4 North, Range 4 West of the W.R.M.*

Section 2: SW¼NW¼

I-4: *Township 4 North, Range 4 West of the W.R.M.*

Section 2: SE¼NW¼

Acres claimed, both I-3 and I-4: 31.4

I-5: *Township 4 North, Range 4 West of the W.R.M.*

Section 16: S½NE¼, SE¼NW¼

Acres claimed: 94

I-6: *Township 4 North, Range 4 West of the W.R.M.*

Section 16: N½SE¼, NE¼SW¼

Acres claimed: 104

Claimant Ralph A. Urbigkit testified that parcels I-1, I-2, I-3 and I-4 are served by Wind River Ditch No. 2,

and parcels I-5 and I-6 by Dry Creek Canal. There appears to be no state-awarded water permits on any of these parcels; however, Tommy King of the State Engineer's office personally inspected and mapped out the Claimants' acreages he thought to be irrigable, as part of my reinstatement work," according to claimant Urbigkit.[8] Claimant further states that he has continuously irrigated since prior to December 31, 1963 those acreages of his "that are expired".[9]

Exhibit T-4 dealing with Parcels I-1 and I-2 was admitted during his testimony. Claimant has owned these parcels since 1966 or 1967, but they have been in the family since 1934, and claimant's father farmed this land with a partner in 1921. Of the total 120 acres, 96.3 acres are being claimed as irrigated. Little Dry creek runs half a mile through this land, but there are no roads, ditches or easements.

As to Parcels I-3 and I-4, claimant states that he purchased these between 1967 and 1970 from an enrolled member of the Tribe, John LeClair, who purchased them from the allottee. This acreage was not under irrigation when LeClair bought it and claimant states that he put 31.4 acres into irrigation and has continually irrigated it since (however, no date was given).[10]

Claimant's parents purchased Parcels I-5 and I-6 in 1941. Claimant states that said parcels were completely cultivated between 1941 and 1944 and were not being irrigated prior to 1941, even though recapitulation of the Goodwin Certificates [11] indicate dates of May 31, 1922 and June 8, 1922 for Parcels I-5 and I-6 respectively as the dates water could have been available for irrigation,

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[8] Tr. p. 290.

[9] Tr. p. 295.

[10] Tr. p. 289.

[11] Phifer's Exhibit T-5.

but not necessarily the dates water was requested.[12] Parcel I-5 currently includes 94 irrigated acres for which claimant pays assessments; and Parcel I-6 includes 104 irrigated acres.

On about half of this acreage, evidence presented on behalf of the Tribes in this adjudication shows that land was once allotted, and Wyoming agrees that title is thus derived from an Indian allottee. But on the 96.3 acres of I-1 and I-2, Wyoming maintains that the actual title transfer to a non-Indian was not from an allottee, but from the United States, and that therefore the chain of title is insufficient to prove derivation from an allottee.

We have considered this objection in other claimants cases and have decided against it. We do so here.

The award is for all land claimed.

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[12] Tr. pp. 293, 294.

CLAIM NO. 15

CLAIMANT, DALE AND PATRICIA URBIGKIT

Wyoming

Total Acres claimed: 265

Acres awarded: 195

Acre-feet Per Year Awarded: 585

Priority Date: April 27, 1905

H-1: *Township 4 North, Range 4 West of the W.R.M.*

Section 4: SW¼NE¼, NW¼SE¼, Lot 6

Acres claimed: 65

H-2: *Township 4 North, Range 4 West of the W.R.M.*

Section 4: W½, S½NW¼, S½ of Lot 3, S½ of Lot 4

Acres claimed: 200

The Claimant prior (Claim No. 14, Ralph K. Urbigkit) is the father of the claimants in this and the following matter (Claims No. 15 and 16). Ralph Urbigkit testifying to his son, Dale Urbigkit's property, said that parcel H-1 has 65 acres that are irrigated and which were probably irrigated since 1937-38, and that parcel H-2 has 200 irrigated acres out of a total of 284.6 acres. Parcel H-2 was acquired by this his son from the estate of John L. Miller in 1975, was irrigated before 1975, was purchased from Neida Large and Mrs. Joseph Calhoun, original allottees during the ten year span in 1950's, and that it was irrigated prior by allottees.

During the father's testimony, he said that, "The land that my son owns has adjudicated water rights, but the

land I own has never. . . ." [12] Unfortunately no one asked which son he was testifying about and this required a search of the records of the State Engineer's office where it was found that, as originally filed by an uncle of the Urbigkit family, John L. Miller, there were indeed adjudicated certificates as follows:

Item	Acres	Land
1	9.28	W½NW¼NE¼
2	4.00	E½NE¼SE¼
3	30.00	SW¼NE¼
4	12.50	W½NE¼SE¼
5	40.00	NW¼SE¼
6	11.25	SE¼SE¼
TOTAL	107.30	

The land in Items 3 and 5 above, totalling 70 acres, is described and claimed in this matter. Since this land already enjoys a higher water right in the form of a valid adjudicated certificate, these 70 acres have been stricken from the totals granted herein. The remaining 195 acres is granted a State permit award with a priority date accordingly. All of these lands are served by the Dry Creek Canal.

[12] Tr. p. 230.

CLAIM NO. 16

CLAIMANT, RALPH FLOYD URBIGKIT

Crowheart, Wyoming 82512

Total Acres claimed: 259.60

Acres awarded: 153.85

Acre-feet Per Year Awarded: 461.55

Priority Date: April 27, 1905

J-1: *Township 4 North, Range 4 West of the W.R.M.*

Section 11: SE¼, SE¼NE½

Acres claimed: 153.85

J-2: *Township 4 North, Range 4 West of the W.R.M.*

Section 15: NW¼NE¼, N½NW¼

Acres claimed: 105.75

Claimant Ralph F. Urbigkit testified in his own behalf in support of the above claims. He said parcel J-1 is served by the Wind River Ditch No. 2 and parcel J-2 by the Dry Creek Canal, and that certain lands were purchased in 1955 from John L. Miller, who was identified earlier as an uncle of the Urbigkit family.

Once again it was necessary to refer to the official records of the State Engineer's Office, which revealed that exactly 105.7 acres in Section 15 (with identical descriptions as in the above claim) were issued adjudicated ceritficates upon application of John L. Miller. This claim is thus reduced accordingly, and granted.

CLAIM NO. 17

CLAIMANT, JOHN (JR) and
BARBARA LONGFELLOW

Box 46, Star Route Arapahoe, Wyoming 82510

Total Acres claimed: 225

Acres awarded: 225

Acre-feet Per Year Awarded: 675

Priority Date: March 18, 1905

Township 1 South, Range 2 East of the W.R.M.

Section 8: NE¼NE¼
Section 9: W½NW¼, NE¼NE¼
Section 16: SW¼SW¼
Section 17: SE¼SE¼

Acres claimed: 240 (225 net)

This was perhaps the clearest presentation to justify an award. Mr. Longfellow testified to and described the 225 net acres which he irrigates annually. He had with him certified warranty deeds of conveyance from the original Indian allottee to the first non-Indian owner, and evidence of his having irrigated and owned the lands for over half a century. His case also included statements of a neighbor giving weight to the fact that the land had been irrigated since the 30's.

The land is served by the Coolidge Project and is awarded a State permit accordingly.

CLAIM NO. 18

CLAIMANT, VERL SNEED and
HOMER BLOMBERG, JR.
by ANNA MERLE BLOMBERG

P.O. Box 229, Riverton, Wyoming 82510

Total Acres claimed: 35

Acres awarded: 35

Acre-feet Per Year Awarded: 105

Priority Date: March 18, 1905

Township 1 South, Range 4 East of the W.R.M.

Section 9: NE¼NE¼

Mrs. Anna M. Blomberg testified in behalf of her son, Homer Blomberg, Jr., and her brother, Verl Sneed, who own a one-fourth and a three-fourths interest in this tract, respectively. The original Indian allottee was identified as John Little, and after his demise, the land was conveyed to "a whole bunch of people," [14] until acquired by the present owners or their immediate family members in the thirties. Mrs. Blomberg recalled that these land were receiving annual irrigation as early as 1930.

The claim is granted.

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[14] Tr. p. 314.

CLAIM NO. 19

CLAIMANT, KATHRYN LINDEN DICKINSON

Route 2, Box 555, Riverton, Wyoming 82510

Total Acres claimed: 16

Acres awarded: 16

Acre-feet Per Year Awarded: 48

Priority Date: May 5, 1905

Township 1 South, Range 3 East of the W.R.M.

Section 17: SE¼SE¼

This land is served by Sub-Agency and is located about three miles west of the Arapahoe School House. Claimant's husband and his father bought in 1938 (originally 200 acres) 100 acres of which is now owned by Mr. Lucas.[15] The land was purchased from one Benjamin Warren, who purchased it from an Indian allottee whose last name was Friday.

This is a claim for 16 acres under irrigation and for which O&M assessment has been paid annually for many years. A State permit for 16 acres is approved.

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[15] See Claim No. 10 herein.

CLAIM NO. 20

CLAIMANT, KENNETH AND PATRICIA PERSSON

680 Bonnie Brae, Lander, Wyoming 82520

Total Acres claimed: 100

Acres awarded: 70

Acre-feet Per Year Awarded: 210

Priority Date: March 18, 1905

Township 1 South, Range 1 West of the W.R.M.

Section 25: W½SE¼, E½SW¼

Mr. Persson testified that he irrigates approximately 100 acres of his land, although "I pay irrigation water (sic) for seventy acres".[16]

The Claimant acquired this acreage in relatively recent years, and presented as proof of Indian allottee origin, a commitment of title insurance which showed a chain of title containing the name of Ernest L. Posey as apparently the original Indian allottee. This land was under cultivation when acquired by Mr. Persson in 1976 and 1977.

The acreage is served by the Ray Canal.

The claim is reduced accordingly, and granted.

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[16] Tr. p. 322.

CLAIM NO. 21

CLAIMANT, CHARLES RICHARDSON

Arizona

Total Acres claimed: 60

Acres awarded: 60

Acre-feet Per Year Awarded: 180

Priority Date: April 27, 1905

R-1: *Township 4 North, Range 3 West, of the W.R.M.*

Section 28: $SE\frac{1}{4}SW\frac{1}{4}$, Lot 6 ($NW\frac{1}{4}SW\frac{1}{4}$), Lot 11 ($SE\frac{1}{4}NW\frac{1}{4}$)

Section 33: $N\frac{1}{2}NE\frac{1}{4}NW\frac{1}{4}$

The absence of Mr. Charles Richardson from the Courtroom during these proceedings made it very difficult to ascertain first-hand all the information needed to establish a rounded basis for an accurate award to him. He was represented by his attorney, Mr. Phifer, who brought out that the claimant was ill and in Arizona at the time of the hearing. Facts necessary to support, even minimally, a claim for water were adduced by questioning Mr. Ralph Urbigkit, a lifelong resident of the area and long identified as one familiar with the Soil Conservation Service and with agriculture generally in the area and particularly with the Richardson land.

In describing one aerial photograph, it would appear that Mr. Richardson had considerably more than 60 acres under irrigation; but there is nothing in the record to justify a larger grant in these proceedings. The witness testified that Mr. Richardson acquired title directly from an Indian allottee in 1936 and this is corroborated in part by Mr. Clear, counsel for the United States. A novel point was raised by Mr. Clear in that the Indian received

a fee patent in 1925 and sold it in 1936, so it was not in trust status for eleven years. Therefore the question becomes whether the Indian himself has to track his due diligence in putting the land under irrigation or does he lose his reserved right? I decline to address this question, yet another *Walton* nuance.

It appears that there is sufficient evidence here to justify an award of water for 60 acres with a Dry Creek priority date, and this was done.

CLAIM NO. 22

CLAIMANT, DR. AND MRS. RICHARD D. MARTIN

Box 637, Crowheart, Wyoming 82512

Total Acres claimed: 80

Acres awarded: 53.6

Acre-feet Per Year Awarded: 161

Priority Date: April 27, 1905

E-1: *Township 4 North, Range 5 West, of the W.R.M.*

Section 36: W½NW¼ and NW¼SW¼

A detailed and intricate cross-examination by Mr. Clear resulted in a downward adjustment of 16.4 acres from an original 80-acre figure. This was a cancellation of certain lands from the Ansel Ditch, an occasion recalled by the claimant and confirmed by him.

There is no question of the strength of this claim. Dr. Martin's family ownership of the land was traced to the first construction of an irrigation ditch, a private ditch, "which was in existence when my father-in-law purchased the property from an Indian, a patentee Indian in 1917." [17]

Permits were applied for but neither granted nor denied, according to Dr. Martin. They may be expired, but could still be adjudicated. There was no evidence of interruption of irrigation in the intervening 66 years.

This is one of the classic fact situations that warrants a permit, with a priority date of the nearest Indian project diversion.

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[17] Tr. p. 392.

CLAIM NO. 23

CLAIMANT, ROBERT PERALTA

Red Creek Ranch, Crowheart, Wyoming 82512

Total Acres claimed:	456 (see discussion below)
Acres awarded:	306
Acre-feet Per Year Awarded:	918
Priority Date:	1905

It is most difficult from a study of the transcript to determine the acreage of this claim. When Mr. Ralph Urbigkit described in his testimony the acreage irrigated in 1934 by lot numbers, he referred to a map which was specifically excluded from evidence.

Witness Urbigkit said as of 1934 there were 361.02 acres irrigated. This did not include the acreage in a given Section 18 which the claimant testified he did not own. Mr. Urbigkit later pointed out that about 150 acres of land irrigated in 1934 has since gone out of irrigation. One can conclude that the 150 acres should be excluded from the 361.02, but there is no factual certainty that this is the case. To add to this clutter, Mr. Phifer acknowledged that the total claim is 306 acres, but this does not coincide with the 361.02 acreage figure provided by Mr. Urbigkit and the location of the 306 acres is not clear or decipherable on the record. Assuming that the legal description provided by Mr. Phifer, which was not in the record of these proceedings, accurately describes the claim, then the legal description is as follows:

Township 5 North, Range 5 West of the W.R.M.

Section 7: SE¼SE¼, Lot 6 (SE¼NE¼, NE¼SE¼), Lot 10 (NW¼SW¼), Lot 11 (SW¼SW¼), SW¼SE¼, Lot 8 (NE¼SW¼), SE¼SW¼

Section 8: Lot 6 ($SW\frac{1}{4}NW\frac{1}{4}$), $NW\frac{1}{4}SW\frac{1}{4}$, $SW\frac{1}{4}SW\frac{1}{4}$

Section 18: Lot 1 ($NW\frac{1}{4}NW\frac{1}{4}$), Lot 2 ($SW\frac{1}{4}NW\frac{1}{4}$), $NE\frac{1}{4}NW\frac{1}{4}$, $NW\frac{1}{4}NE\frac{1}{4}$

The record supports that all acreage claimed (if the above is correct) was once Indian allotted land. Conveyances to a non-Indian took place between May 3, 1919, and in 1931-1935 from the United States as grantor. The testimony is that this land was previously owned by an uncle of the Urbigkit family, John L. Miller, a grantor in several other claimants' cases. The evidence is clear that the land was irrigated in 1934 and that about 456 acres undescribed are assumed to be currently irrigated by the claimant. This was corroborated by Mr. Urbigkit also.

There is evidence that Mr. Miller purchased the land from a Mr. McFarland who acquired, before the land was opened for settlement, certain tracts from a conveyor named Whiskey Jack. There are deeds to indicate that the entire property was granted from an Indian allottee, but the evidence is also clear that certain tracts were conveyed by the United States after a break in chain from allotment status.

Mr. Clear for the United States asserts that Whiskey Jack's allotment was a non-irrigable one because it was not within the project and therefore a 1905 permit should not be awarded herein, but that a 1919 or 1930 date would be appropriate. I find it difficult to make an exception in this case when I have ruled in numerous claims so far that if the land was originally an allotment and a part of the Reservation, the 1905 date should apply. Therefore the claim is granted.

CLAIM NO. 24

CLAIMANT, LANDIS WEBBER FOR RED CREEK CATTLE COMPANY

Wyoming

Total Acres claimed: 274

Township 8 North, Range 2 East of the W.R.M.

Section 5: Lot 2 ($NW\frac{1}{4}NE\frac{1}{4}$)
Lot 3, $SE\frac{1}{4}NW\frac{1}{4}$

This is a continuation of perhaps the most celebrated water case in Wyoming. The claim of Landis Webber is to in effect move a series of 1905 adjudicated certificates which he has long enjoyed to be ordered changed to an 1868 reservation date priority, although he would accept a 1898 date, which was the date of the first application for beneficial use of water by the Duncan children.

This claim is *res adjudicata*, and as such, having been rejected in *Merrill v. Bishop*,[18] I can make no finding on this issue. Further, see page 5 of this Report, *supra*.

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[18] *Merrill v. Bishop*, ibid.

CLAIM NO. 25

CLAIMANT, BERTHA LEE JONES

Wyoming

Total Acres claimed: 240

Township 9 North, Range 2 East of the W.R.M.

Section 35: SE¼NW¼, Lot 1 (NE¼NW¼), W½SE¼, W½NE¼

This also is claim to in effect move a series of 1905 adjudicated certificates to be ordered changed to an 1868 reservation date priority.

This claim is *res adjudicata*, and as such, having been rejected in *Merrill v. Bishop*,[19] I can make no finding on this issue. Further, see page 5 of this Report, *supra*.

[19] *Merrill v. Bishop*, ibid.

CLAIM NO. 26

CLAIMANT, GRACE GRABOSKI

Wyoming

Total Acres claimed: 200

Township 9 North, Range 2 East of the W.R.M.

Section 35: Lot 3 ($SE\frac{1}{4}NW\frac{1}{4}$), $W\frac{1}{2}SW\frac{1}{4}$, $E\frac{1}{2}SW\frac{1}{4}$

This also is claim in effect to move a series of 1905 adjudicated certificates to be ordered changed to an 1868 reservation date priority.

This claim is *res adjudicata*, and as such having been rejected in *Merrill v. Bishop*,[20] I can make no finding on this issue. Further, see page 5 of this Report, *supra*.

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[20] *Merrill v. Bishop*, ibid.

E. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. In general, I find that Wyoming and the United States, to the same degree, have acquiesced for decades and in some instances for nearly half a century, in the delivery of irrigation water year after year to record owners of the one-time Indian allotment lands involved in each of the Claims Nos. 1 through 23 in Part I of this Final Report. Often permits had expired but water continued to be delivered and applied to beneficial use. Often operation and maintenance charges continued to be assessed to owners annually and water delivered annually.

2. I therefore find that both the State of Wyoming and the United States are estopped from denying claims of defendants in Claims Nos. 1 through 23 herein, by virtue of the above acquiescence, by virtue of the absence of supervision by Wyoming, the issuance of Goodwin Certificates by the United States, and in their practice concurred in for so many years that non-Indians on the Wind River Indian Reservation who took from an allottee need not get a state permit.[1]

3. All findings of fact contained in the Report dated December 15, 1982, dealing with reserved water rights affecting alienated lands, be and the same are hereby made a part hereof.

4. With respect to all claims Nos. 1 through 23, the Court finds that the identified land of each claimant:

(a) Was originally a part of the Wind River Indian Reservation, and was alienated therefrom by virtue of the General Allotment Act.

(b) Had been regularly irrigated beginning with the date and for the periods mentioned in each claim discussed, and the water thereon put to beneficial use.

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[1] Exs. T-5, T-6.

5. With respect to all claimants under claims Nos. 1 through 23, the Court finds that such claimants or their non-Indian precedessors expected to use water either from a Federal irrigation Project, or from other available sources, when they purchased their land.

6. That claims Nos. 24, 25 and 26 are res judicata and are therefore without merit.

7. The findings of fact for each claimant are as follows:

CLAIM NO. 1

CLAIMANT, RUDY AND NANCY ZUPENCE

Acres claimed: 50

Township 1 South, Range 1 West of the W.R.M.:

Section 5: NE¼SW¼, N½SE¼SW¼, W½SE¼SE¼SW¼

This claim is fifty acres under irrigation, is under permit, but is currently expired.[2] It has been irrigated since prior to 1963 and every year subsequent thereto. The property was irrigated by the Indian allottee, Mr. Surrell, prior to 1955, and the whole tract was put under irrigation upon being purchased by John Meridith in 1955.[3]

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[2] Ex. T-1.

[3] Tr. pp. 192, 193.

CLAIM NO. 2

CLAIMANT, ALBERT HORNECKER

Acres claimed: 420.97

Parcel and Land Description [4]	Acreage	Award
Section 21: SW¼SW¼	38.85	116.55
Section 27: N½NW¼	64.25	192.75
Section 28: NE½SE¼	77.75	233.25
Section 28: SW¼SE¼, SE¼SW¼	69.99	209.97
Section 29: SE¼SW¼	31.70	95.13
Section 32: NW¼NE¼	35.61	106.83
TOTALS	318.15	954.48

The 38.85 acres is presently under an expired state permit and has been irrigated prior to December, 1963, and continuously thereafter.[5] The 64.25 acre tract is not currently under any state permit but has also been irrigation prior to 1963 and continuously since. The 77.75 acre tract is not contained under any state permit, was purchase for irrigation, and a little less than 80 acres was broken out of sagebrush in 1923 and 1924. The 69.99 acre tract currently has two acres under state permit; was broken out of sagebrush in 1942 and 1943 with approximately 78 acres broken out and farmed.[6] The property has been irrigated prior to December 31, 1963, and to the present date by Albert Hornecker.[7]

The 31.70 acre parcel has been irrigated by Albert Hornecker since prior to December 31, 1963 and is pres-

[4] All claims are in Township 1 South, Range 1 East of the Wind River Meridian.

[5] Tr. p. 158; Ex. T-1.

[6] Tr. p. 185.

[7] Tr. p. 158.

ently expired under state permit. As much as 25 acres were irrigated as early as 1916 or 1917.[8] The 35.61 acre parcel is presently expired under state permit, was irrigated by Albert Hornecker prior to December 31, 1963. About 35 acres were irrigated as early as 1916 to 1917.[9]

CLAIM NO. 3

CLAIMANT, CHARLES M. ROEMER

Acres claimed: 53

Township 1 South, Range 1 West of the W.R.M.

Section 5: S½NW¼SE¼, NW¼NW¼SE¼, SW¼SE¼

Mr. Roemer's tract contains some land that is higher than the ditches delivering water, includes other non-irrigable portions, and in 1981, the Bureau of Indian Affairs reduced acreage of this claimant from 53 to 24 or 25 acres, and reduced charges accordingly. There are no crops and the flood irrigation is for pasture only.

CLAIM NO. 4

CLAIMANT, HOMER BLOMBERG, SR.

Acres claimed: 15.47

Township 1 South, Range 4 East of the W.R.M.

Section 10: E½NW¼NW¼

This land was purchased by the claimant in 1937, is served in a Federal Irrigation Project and was originally conveyed to a non-Indian in 1920. Assessment figures in

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[8] Tr. pp. 173, 174.

[9] Tr. pp. 174, 1975.

1958 changed the 15.47 acres to 15.0 acres and this finding reflects that change.

CLAIM NO. 5

CLAIMANT, KENNETH AND GLADYS HANSEN

Total acres claimed: 152

C-1: *Township 1 South, Range 1 East of the W.R.M.*

Section 1: E½SE¼

Acres claimed: 42

C-2: *Township 1 South, Range 1 East of the W.R.M.*

Section 11: W½NW¼

Acres claimed: 71

C-3: *Township 1 South, Range 1 East of the W.R.M.*

Section 12: NW¼NE¼

Acres claimed: 39

The 42 acre tract carries a patent date of 1919, was irrigated prior to 1963 and continuously since then.[10] This property is presently expired under state permit. The 71 acre tract bears a patent date of 1909, beneficial use of water was completed in 1918.[11] The 39 acre tract is presently on an expired permit, and was irrigated as early as 1922 when 40 acres were under irrigation.

All three parcels were allotment lands.

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[10] Tr. pp. 212, 213.

[11] Ex. C-2-2.

CLAIM NO. 6

CLAIMANT, JAMES NIRIDER

Total Acres claimed: 248.46

F-1: *Township 1 South, Range 1 East of the W.R.M.*
Section 2: E½SE¼, and SE½NE¼
Acres claimed: 72.0

F-2: *Township 1 South, Range 2 East of the W.R.M.*
Section 7: SE¼NW¼, and Lot 2
Acres claimed: 79.16

F-3: *Township 1 South, Range 1 East of the WR.M.*
Section 35: E½SE¼
Acres claimed: 97.3

The 72 acre tract is under an expired permit, has been continuously irrigated by James Nirider since prior to 1963, has a patent date of 1919, and has been irrigated continuously in the lifetime of the present owner. The 79.16 acre tract is also under an expired permit and has been irrigated since 1963 by the present owner. The 97.3 acre tract bears a patent date of 1916 and has enjoyed beneficial use of water completed in 1916 on the original 80 acres thereof. All three tracts are original allotment lands.

CLAIM NO. 7

CLAIMANT, THOMAS REED

Total Acres claimed: 115 (170 less 55, G-1)

G-1: *Township 1 South, Range 1 East of the W.R.M.*
Section 15: S½NW¼
Acres claimed: 55

G-2: *Township 1 South, Range 1 East of the W.R.M.*
Section 22: S½NE¼
Acres claimed: 60

G-3: *Township 1 South, Range 1 East of the W.R.M.*
Section 22: N½NW¼
Acres claimed: 55

All three of the Reed tracts have patent dates originating in 1912 or before, and all three were originally allotment lands and have been under continuous irrigation since as early as 1917. The later two tracts have expired state permits.

CLAIM NO. 8

CLAIMANT, DONALD BATH;
DHB & CO., and PLB & CO.

Total Acres claimed: 492.95

B-1: *Township 1 South, Range 3 East of the W.R.M.*
Section 13: E½NE¼
Acres claimed: 78.1

B-2: *Township 1 South, Range 3 East of the W.R.M.*
Section 14: E½NW¼
Acres claimed: 78.85

B-3: *Township 1 South, Range 3 East of the W.R.M.*
Section 14: SW¼NE¼ and NW¼SE¼
Acres claimed: 74.2

B-4: *Township 1 South, Range 3 East of the W.R.M.*
Section 14: SE¼NE¼ and NE¼SE¼
Acres claimed: 69.3

B-5: *Township 1 South, Range 3 East of the W.R.M.*
Section 15: N½NE¼
Acres claimed: 74.25

B-6: *Township 1 South, Range 3 East of the W.R.M.*
Section 16: SE¼SE¼ (33.25 acres)
Section 21: E½NE¼ (25.00 acres)
Acres claimed: 58.25

B-7: *Township 1 South, Range 3 East of the W.R.M.*
Section 22: NW¼
Acres claimed: 60

The 33.25 acres in the B-6 description above are under an existing adjudicated certificate, so this total was deducted from the acres claimed in the seven tracts above. All remaining lands have had patent dates beginning with 1909 through 1924; some were traced to ownership and irrigation as early as 1920; other tracts were acquired as late as 1960. B-6 and B-7 were purchased in 1973. Three of the above parcels are presently being irrigated under a state permit.

CLAIM NO. 9

CLAIMANT, BRADFORD BATH

Total Acres claimed: 79.0

A-1: *Township 1 South, Range 3 East of the W.R.M.*
Section 14: W½SW¼ (except 2.76 acres)
Acres claimed: 79.0

This property was under irrigation in 1920.[12] A 1922 agricultural report in evidence substantiates that 40

[12] Tr. p. 273.

acres were irrigated in the SW¼SW¼ at that time. The property has been continuously irrigated since 1963, was originally permitted, but long since expired.

CLAIM NO. 10

CLAIMANT, ARTHUR AND WANDA LUCAS

Total Acres claimed: 31

O-1: *Township 1 South, Range 3 East of the W.R.M.*

Section 17: SW¼SE¼

Acres claimed: 19

O-2: *Township 1 South, Range 3 East of the W.R.M.*

Section 20: Westerly 990′ of E½NE¼

Acres claimed: 12

The patent date of the above two, former allotment parcels is 1919. The areas have had permits which are currently expired that date back to 1910. Both parcels have been under irrigation since 1920.

CLAIM NO. 11

CLAIMANT, HENRY AND VIOLET LEWIS

Total Acres claimed: 62

N-1: *Township 1 South, Range 3 East of the W.R.M.*

Section 12: E½SE¼

The 62 acres has been owned by the claimant since 1940 and most all of the acreage has been under irrigation ever since 1920 and 1925. The original patent date was March 24, 1910, and the property is currently expired acreage under a state permit.

CLAIM NO. 12

CLAIMANT, GRIFFIN BROTHERS, INCORPORATED by HERSCHEL GRIFFIN

Total Acres claimed: 456

P-1: *Township 1 South, Range 3 East of the W.R.M.*

Section 1: S½ of Lot 1, SE¼NE¼, N½NE¼SE¼

Acres claimed: 5

P-2: *Township 1 South, Range 3 East of the W.R.M.*

Section 1: SW¼NE¼, N½NW¼, SE¼, S½ of Lot 2 (NW¼NE¼)

Acres claimed: 10

P-3: *Township 1 South, Range 4 East of the W.R.M.*

Section 7: Lot 1 (NW¼NW¼), NE¼NW¼, NW¼NE¼

Acres claimed: 85

P-4: *Township 1 South, Range 4 East of the W.R.M.*

Section 16: Lot 3 (SW¼NW¼, W½SW¼)
Section 17: Lot 2, Lot 3, E¼SE¼

Acres claimed: 170

P-5: *Township 1 South, Range 4 East of the W.R.M.*

Section 17: NE¼SE¼, NW¼SE¼

Acres claimed: 61

P-6: *Township 1 South, Range 4 East of the W.R.M.*

Section 17: SW¼SE¼
Section 20: NW¼NE¼

Acres claimed: 30

P-7: *Township 1 South, Range 4 East of the W.R.M.*

Section 19: SE¼NW¼, SW¼NE¼,
NW¼SE¼, NE¼SE¼

Acres claimed: 95

The claimant testified that not over 15 acres are assessed of the combination of the first two tracts; one Hamon Lacy purchased this land from the original Indian allottee and broke it out of sagebrush. Claimant's father purchased the 85 acre tract from the allottee in 1920, broke it out of sagebrush the following year, and it has been irrigated continuously since then.

The 170 acre tract and other areas served by Double Ditch were part of the original P. J. O'Connor lands, and the testimony is clear that these lands are served under an adjudicated certificate. Still the owner testified that he was sure that it is under a state permit. This finding will accept the adjudicated status of said acres and deny them a 1905 right.

CLAIM NO. 13

CLAIMANT, DON VAN RIPER

Total Acres claimed: 54

K-1: *Township 1 South, Range 2 East of the W.R.M.*

Section 6: Lot 4 (NW¼NW¼)
Lot 5 (SW¼NW¼)

These acres were first patented in 1919 and the 54 acres have been owned by the claimant since 1963 and have been irrigated ever since. O & M charges are paid on only 23 acres, but the claimant testified that an additional assessment is in the process of being levied against him.

CLAIM NO. 14

CLAIMANT, RALPH AND EILEEN URBIGKIT

Total Acres claimed: 325.7

I-1: *Township 4 North, Range 4 West of the W.R.M.*
Section 2: E½SW¼

I-2: *Township 4 North, Range 4 West of the W.R.M.*
Section 2: SW¼SW¼
Acres claimed, both I-1 and I-2: 96.3

I-3: *Township 4 North, Range 4 West of the W.R.M.*
Section 2: SW¼NW¼

1-4: *Township 4 North, Range 4 West of the W.R.M.*
Section 2: SE¼NW¼
Acres claimed, both I-3 and I-4: 31.4

I-5: *Township 4 North, Range 4 West of the W.R.M.*
Section 16: S½NE¼, SE¼NW¼
Acres claimed: 94

I-6: *Township 4 North, Range 4 West of the W.R.M.*
Section 16: N½SE¼, NE¼SW¼
Acres claimed: 104

The two parcels totalling 96.3 acres were patented before 1917, were farmed by Ralph Urbigkit's father from 1921 to 1927, both properties originally permitted, but expired, and are irrigation from the Wind River Ditch by Ralph Urbigkit since prior to 1963 and every year subsequent thereto. The parcels containing a total

of 31.4 acres were purchased by Ralph Urbigkit from John LeClair, an enrolled member of the Tribe, who took from the original allottee. This property was originally permitted, but the permit has expired. It is also served by Wind River Ditch No. 2.[13]

The 94 acre tract was originally permitted, is now expired, has been irrigated by Ralph Urbigkit and his family since put under cultivation between the years 1941 and 1945. The 104 acre tract was also originally permitted, but the permit has since expired. This property has been irrigated by Ralph Urbigkit and his family since put under cultivation between the years 1941 and 1945. Goodwin Certificates in evidence indicate that much of this acreage could have been put under irrigation and that water was available thereof beginning May 31, 1922.

CLAIM NO. 15

CLAIMANT, DALE AND PATRICIA URBIGKIT

Total Acres claimed: 265

H-1: *Township 4 North, Range 4 West of the W.R.M.*

Section 4: SW¼NE¼, NW¼SE¼, Lot 6

Acres claimed: 65

H-2: *Township 4 North, Range 4 West of the W.R.M.*

Section 4: W½, S½NW¼, S½ of Lot 3, S½ of Lot 4

Acres claimed: 200

This property contains approximately 200 irrigated acres, was acquired by Dale Urbigkit's great uncle, John Miller, from the original allottees, Neida Large and Mrs.

[13] Tr. pp. 289, 290.

Joseph Calhoun. This property was irrigated prior to being purchased by John Miller from the original allottees and was originally permitted under a state permit that has since expired.

The 65 acres in Lot 6 has been irrigated since at least 1937, and 70 acres of the said property is covered in a valid adjudicated certificate and have therefore been stricken from totals granted herein.

CLAIM NO. 16

CLAIMANT, RALPH FLOYD URBIGKIT

Total Acres claimed: 259.60

J-1: *Township 4 North, Range 4 West of the W.R.M.*

Section 11: SE¼, SE¼NE¼

Acres claimed: 153.85

J-2: *Township 4 North, Range 4 West of the W.R.M.*

Section 15: NW¼NE¼, N½NW¼

Acres claimed: 105.75

Of the total 259.60 acres claimed, exactly 105.7 acres as set forth in Section 15, Township 4 North, Range 4 West of the W.R.M., are the exact 105.7 acres identified in the State Engineer's office on which were issued adjudicated certificates upon an application of John L. Miller. Therefore, this claim of 259.60 acres was reduced accordingly to an award of 153.85 acres.

CLAIM NO. 17

CLAIMANT, JOHN (JR.) and BARBARA LONGFELLOW

Total Acres claimed: 225

Township 1 South, Range 2 East of the W.R.M.

Section 8: NE¼NE¼
Section 9: W½NW¼, NE¼NE¼
Section 16: SW¼SW¼
Section 17: SE¼SE¼

Acres claimed: 240 (225 net)

The 225 acre claim herein was conveyed from an original Indian allottee to a series of non-Indian owners and has been irrigated and owned by said owners for over half a century.

CLAIM NO. 18

CLAIMANT, VERL SNEED and HOMER BLOMBERG, JR.
by ANNA MERLE BLOMBERG

Total Acres claimed: 35

Township 1 South, Range 4 East of the W.R.M.

Section 9: NE¼NE¼

The original Indian allottee of the above tract was John Little, and after his demise the land was conveyed to a series of people until acquired by its present owners in the 1930's. These lands received annual irrigation since such time.

CLAIM NO. 19

CLAIMANT, KATHRYN LINDEN DICKINSON

Total Acres claimed: 16

Township 1 South, Range 3 East of the W.R.M.

Section 17: SE¼SE¼

Claimant's husband and his father bought this land in 1938 from one Benjamin Warren who purchased it from

the Indian allottee whose last name was "Friday". Operation and Maintenance Assessment has been paid annually for many years.

CLAIM NO. 20

CLAIMANT, KENNETH AND PATRICIA PERSSON

Total Acres claimed: 100

Township 1 South, Range 1 West of the W.R.M.

Section 25: W½SE¼, E½SW¼

The evidence indicates the original Indian allottee was a person namely Ernest L. Posey. This land was under cultivation when acquired by the claimant in 1976 or 1977. The Operation and Maintenance Assessment payments are for a total 70 acres, and the claim is reduced to 70 acres accordingly.

CLAIM NO. 21

CLAIMANT, CHARLES RICHARDSON

Total Acres claimed: 60

R-1: *Township 4 North, Range 3 West, of the W.R.M.*

Section 28: SE¼SW¼, Lot 6 (NW¼SW¼), Lot 11 (SE¼NW¼)

Section 33: N½NE¼NW¼

Mr. Richardson acquired title directly from an Indian allottee in 1936.

CLAIM NO. 22

CLAIMANT, DR. AND MRS. RICHARD D. MARTIN

Total Acres claimed: 80

E-1: *Township 4 North, Range 5 West, of the W.R.M.*

Section 36: W½NW¼ and NW¼SW¼

Dr. Martin's family ownership was traced to the construction of a ditch in existence when his predecessor purchased from an Indian patentee in 1917. 16.4 acres was deleted from the claim of 80 acres and a right to water is found to exist for the remaining 53.6 acres.

CLAIM NO. 23

CLAIMANT, ROBERT PERALTA

Total Acres claimed: 456

Township 5 North, Range 5 West of the W.R.M.

Section 7: SE¼SE¼, Lot 6 (SE¼NE¼, NE¼SE¼), Lot 10 (NW¼SW¼), Lot 11 (SW¼SW¼), SW¼SE¼, Lot 8 (NE¼SW¼), SE¼SW¼

Section 8: Lot 6 (SW¼NW¼), NW¼SW¼, SW¼SW¼

Section 18: Lot 1 (NW¼NW¼), Lot 2 (SW¼NW¼), NE¼NW¼, NW¼NE¼

Acreage claims was all once Indian allotted land and beneficial use of water completed in 1919 on over 100 acres.

CLAIMS NO. 24, 25, and 26

Claims No. 24, 25 and 26 have their basis in asserting that owners of allotment lands are entitled to a treaty date priority. The matter has been addressed in *Merrill v. Bishop*, supra, and is now res judicata; these claims are therefore without merit.

F. RECOMMENDED FINAL DECREE

IN THE DISTRICT COURT
OF THE FIFTH JUDICIAL DISTRICT
STATE OF WYOMING

Civil No. 4993

IN RE: IN GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE BIG HORN RIVER SYSTEM AND ALL OTHER SOURCES, STATE OF WYOMING.

RECOMMENDED FINAL DECREE

IT IS ORDERED, ADJUDICATED AND DECREE, that the following claimants to the right to use water in the Big Horn River System be and the same hereby are awarded State Permits for water in the volumes and priority as set forth herein:

CLAIM NO. 1

CLAIMANT, RUDY AND NANCY ZUPENCE

Box 333, Ft. Washakie, Wyoming 82514

Acres claimed: 50

Acres awarded: 50

Acre-feet Per Year Awarded: 150

Priority Date: March 18, 1905

Township 1 South, Range 1 West of the W.R.M.:

Section 5: NE¼SW¼, N½SE¼SW¼, W½SE¼SE¼SW¼

CLAIM NO. 2

CLAIMANT, ALBERT HORNECKER

Route 61, Ethete, Wyoming

Acres claimed: 420.97
Acres awarded: 318.15
Acre-feet Per Year Awarded: 954.48
Priority Date: March 18, 1905

Township 1 South, Range 1 East of the W.R.M.

Parcel and Land Description	Acreage	Award
Section 21: SW¼SW¼	38.85	116.55
Section 27: N½NW¼	64.25	192.75
Section 28: N½SE¼	77.75	233.25
Section 28: SW¼SE¼, SE¼SW¼	69.99	209.97
Section 29: SE¼SW¼	31.70	95.13
Section 32: NW¼NE¼	35.61	106.83
TOTALS	318.15	954.48

CLAIM NO. 3

CLAIMANT, CHARLES M. ROEMER

Box 563, Lander, Wyoming 82520

Acres claimed: 53
Acres awarded: 25
Acre-feet Per Year Awarded: 75
Priority Date: March 18, 1905

Township 1 South, Range 1 West of the W.R.M.

Section 5: S½NW¼SE¼, NW¼NW¼SE¼, SW¼SE¼

CLAIM NO. 4

CLAIMANT, HOMER BLOMBERG, SR.
P.O. Box 229, Riverton, Wyoming 82501

Acres claimed: 15.47
Acres awarded: 15.00
Acre-feet Per Year Awarded: 45
Priority Date: March 18, 1905

Township 1 South, Range 4 East of the W.R.M.
Section 10: E½NW¼NW¼

CLAIM NO. 5

CLAIMANT, KENNETH AND GLADYS HANSEN
Box 55 Star Route, Arapahoe, Wyoming 82510

Total acres claimed: 152
Acres awarded: 152
Acre-feet Per Year Awarded: 456
Priority Date: March 18, 1905

C-1: *Township 1 South, Range 1 East of the W.R.M.*
Section 1: E½SE¼
Acres claimed: 42

C-2: *Township 1 South, Range 1 East of the W.R.M.*
Section 11: W½NW¼
Acres claimed: 71

C-3: *Township 1 South, Range 1 East of the W.R.M.*
Section 12: NW¼NE¼
Acres claimed: 39

CLAIM NO. 6

CLAIMANT, JAMES NIRIDER

Box 62, Arapahoe, Wyoming 82501

Total Acres claimed: 248.46

Acres awarded: 248.46

Acre-feet Per Year Awarded: 745.38

Priority Date: March 18, 1905

F-1: *Township 1 South, Range 1 East of the W.R.M.*

Section 2: E½SE¼, and SE½NE¼

Acres claimed: 72.0

F-2: *Township 1 South, Range 2 East of the W.R.M.*

Section 7: SE¼NW¼, and Lot 2

Acres claimed: 79.16

F-3: *Township 1 South, Range 1 East of the W.R.M.*

Section 35: E½SE¼

Acres claimed: 97.3

CLAIM NO. 7

CLAIMANT, THOMAS REED

P.O. Box 45, Lander, Wyoming 82520

Total Acres claimed: 115 (170 less 55, G-1)

Acres awarded: 115

Acre-feet Per Year Awarded: 345

Priority Date: March 18, 1905

G-1: *Township 1 South Range 1 East of the W.R.M.*

Section 15: S½NW¼

Acres claimed: 55

G-2: *Township 1 South, Range 1 East of the W.R.M.*

Section 22: S½NE¼

Acres claimed: 60

G-3: *Township 1 South, Range 1 East of the W.R.M.*

Section 22: N½NW¼

Acres claimed: 55

CLAIM NO. 8

CLAIMANT, DONALD BATH;
DHB & CO., and PLB & CO.

Star Route, Box 95, Arapahoe, Wyoming 82510

Total Acres claimed: 492.95

Acres awarded: 459.70

Acre-feet Per Year Awarded: 1380

Priority Date: May 5, 1905

B-1: *Township 1 South, Range 3 East of the W.R.M.*

Section 13: E½NE¼

Acres claimed: 78.1

B-2: *Township 1 South, Range 3 East of the W.R.M.*

Section 14: E½NW¼

Acres claimed: 78.85

B-3: *Township 1 South, Range 3 East of the W.R.M.*
Section 14: SW¼NE¼ and NW¼SE¼
Acres claimed: 74.2

B-4: *Township 1 South, Range 3 East of the W.R.M.*
Section 14: SE¼NE¼ and NE¼SE¼
Acres claimed: 69.3

B-5: *Township 1 South, Range 3 East of the W.R.M.*
Section 15: N½NE¼
Acres claimed: 74.25

B-6: *Township 1 South, Range 3 East of the W.R.M.*
Section 16: SE¼SE¼ (33.25 acres)
Section 21: E½NE¼ (25.00 acres)
Acres claimed: 58.25

B-7: *Township 1 South, Range 3 East of the W.R.M.*
Section 22: NW¼
Acres claimed: 60

CLAIM NO. 9

CLAIMANT, BRADFORD BATH

Star Route, Box 95, Arapahoe, Wyoming 82510

Total Acres claimed: 79.0
Acres awarded: 79.0
Acre-feet Per Year Awarded: 237
Priority Date: May 5, 1905

A-1: *Township 1 South, Range 3 East of the W.R.M.*
Section 14: W½SW¼ (except 2.76 acres)
Acres claimed: 79.0

CLAIM NO. 10

CLAIMANT, ARTHUR AND WANDA LUCAS

Box 22, Star Route, Arapahoe, Wyoming 82510

Total Acres claimed: 31

Acres awarded: 31

Acre-feet Per Year Awarded: 93

Priority Date: May 5, 1905

O-1: *Township 1 South, Range 3 East of the W.R.M.*

Section 17: SW¼SE¼

Acres claimed: 19

O-2: *Township 1 South, Range 3 East of the W.R.M.*

Section 20: Westerly 990′ of E½NE¼

Acres claimed: 12

CLAIM NO. 11

CLAIMANT, HENRY AND VIOLET LEWIS

Arapahoe Route, Box 3060, Riverton, Wyoming 82510

Total Acres claimed: 62

Acres awarded: 62

Acre-feet Per Year Awarded: 186

Priority Date: May 5, 1905

N-1: *Township 1 South, Range 3 East of the W.R.M.*

Section 12: E½SE¼

CLAIM NO. 12

CLAIMANT, GRIFFIN BROTHERS, INCORPORATED
by HERSCHEL GRIFFIN

Box 322, Riverton, Wyoming 82501

Total Acres claimed: 456

Acres awarded: 100

Acre-feet Per Year Awarded: 300

Priority Date: March 18, 1905

P-1: *Township 1 South, Range 3 East of the W.R.M.*

Section 1: S½ of Lot 1, SE¼NE¼, N½NE¼SE¼

Acres claimed: 5

P-2: *Township 1 South, Range 3 East of the W.R.M.*

Section 1: SW¼NE¼, N½NW¼, SE¼, S½ of Lot 2 (NW¼NE¼)

Acres claimed: 10

P-3: *Township 1 South, Range 4 East of the W.R.M.*

Section 7: Lot 1 (NW¼NW¼), NE¼NW¼, NW¼NE¼

Acres claimed: 85

P-4: *Township 1 South, Range 4 East of the W.R.M.*

Section 16: Lot 3 (SW¼NW¼, W½SW¼)
Section 17: Lot 2, Lot 3, E¼SE¼

Acres claimed: 170

P-5: *Township 1 South, Range 4 East of the W.R.M.*

Section 17: NE¼SE¼, NW¼SE¼

Acres claimed: 61

P-6: *Township 1 South, Range 4 East of the W.R.M.*

Section 17: SW¼SE¼
Section 20: NW¼NE¼

Acres claimed: 30

P-7: *Township 1 South, Range 4 East of the W.R.M.*

Section 19: SE¼NW¼, SW¼NE¼,
NW¼SE¼, NE¼SE¼

Acres claimed: 95

CLAIM NO. 13

CLAIMANT, DON VAN RIPER

Route 61, Box 63, Lander, Wyoming 82601

Total Acres claimed: 54

Acres awarded: 54

Acre-feet Per Year Awarded: 162

Priority Date: March 18, 1905

K-1: *Township 1 South, Range 2 East of the W.R.M.*

Section 6: Lot 4 (NW¼NW¼)
Lot 5 (SW¼NW¼)

CLAIM NO. 14

CLAIMANT, RALPH AND EILEEN URBIGKIT

Crowheart, Wyoming 82512

Total Acres claimed: 325.7

Acres awarded: 325.7

Acre-feet Per Year Awarded: 977

Priority Date: April 27, 1905

I-1: *Township 4 North, Range 4 West of the W.R.M.*

Section 2: E½SW¼

I-2: *Township 4 North, Range 4 West of the W.R.M.*

Section 2: SW¼SW¼

Acres claimed, both I-1 and I-2: 96.3

I-3: *Township 4 North, Range 4 West of the W.R.M.*

Section 2: SE¼NW¼

I-4: *Township 4 North, Range 4 West of the W.R.M.*

Section 16: S½NE¼, SE¼NW¼

Acres claimed, both I-3 and I-4: 31.4

I-5: *Township 4 North, Range 4 West of the W.R.M.*

Section 16: S½NE¼, SE¼NW¼

Acres claimed: 94

I-6: *Township 4 North, Range 4 West of the W.R.M.*

Section 16: N½SE¼, NE¼SW¼

Acres claimed: 104

CLAIM NO. 15

CLAIMANT, DALE AND PATRICIA URBIGKIT

Wyoming

Total Acres claimed: 265

Acres awarded: 195

Acre-feet Per Year Awarded: 585

Priority Date: April 27, 1905

H-1: *Township 4 North, Range 4 West of the W.R.M.*

Section 4: SW¼NE¼, NW¼SE¼, Lot 6

Acres claimed: 65

H-2: *Township 4 North, Range 4 West of the W.R.M.*

Section 4: W½, S½NW¼, S½ of Lot 3, S½ of Lot 4

Acres claimed: 200

CLAIM NO. 16

CLAIMANT, RALPH FLOYD URBIGKIT

Crowheart, Wyoming 82512

Total Acres claimed: 259.60

Acres awarded: 153.85

Acre-feet Per Yard Awarded: 461.55

Priority Date: April 27, 1905

J-1: *Township 4 North, Range 4 West of the W.R.M.*

Section 11: SE¼, SE¼NE½

Acres claimed: 153.85

J-2: *Township 4 North, Range 4 West of the W.R.M.*
Section 15: NW¼NE¼, NW½NW¼
Acres claimed: 105.75

CLAIM NO. 17

CLAIMANT, JOHN (JR.) and
BARBARA LONGFELLOW

Box 46, Star Route Arapahoe, Wyoming 82510

Total Acres claimed: 225
Acres awarded: 225
Acre-feet Per Year Awarded: 675
Priority Date: March 18, 1905

Township 1 South, Range 2 East of the W.R.M.

Section 8: NE¼NE¼
Section 9: W½NW¼, NE¼NE¼
Section 16: SW¼SW¼
Section 17: SE¼SE¼
Acres claimed: 240 (225 net)

CLAIM NO. 18

CLAIMANT, VERL SNEED and
HOMER BLOMBERG, JR.
by ANNA MERLE BLOMBERG

P.O. Box 229, Riverton, Wyoming 82510

Total Acres claimed: 35
Acres awarded: 35
Acre-feet Per Year Awarded: 105
Priority Date: March 18, 1905

Township 1 South, Range 4 East of the W.R.M.

Section 9: NE¼NE¼

CLAIM NO. 19

CLAIMANT, KATHRYN LINDEN DICKINSON
Route 2, Box 555, Riverton, Wyoming 82510

Total Acres claimed: 16
Acres awarded: 16
Acre-feet Per Year Awarded: 48
Priority Date: May 5, 1905

Township 1 South, Range 3 East of the W.R.M.
Section 17: SE¼SE¼

CLAIM NO. 20

CLAIMANT, KENNETH AND PATRICIA PERSSON
680 Bonnie Brae, Lander, Wyoming 82510

Total Acres claimed: 100
Acres awarded: 70
Acre-feet Per Year Awarded: 210
Priority Date: March 18, 1905

Township 1 South, Range 1 West of the W.R.M.
Section 25: W½SE¼, E½SW¼

CLAIM NO. 21

CLAIMANT, CHARLES RICHARDSON
Arizona

Total Acres claimed: 60
Acres awarded: 60
Acre-feet Per Year Awarded: 180
Priority Date: April 27, 1905

R-1: *Township 4 North, Range 3 West, of the W.R.M.*

Section 28: $SE\frac{1}{4}SW\frac{1}{4}$, Lot 6 ($NW\frac{1}{4}SW\frac{1}{4}$), Lot 11 ($SE\frac{1}{4}NW\frac{1}{4}$)

Section 33: $N\frac{1}{2}NE\frac{1}{4}NW\frac{1}{4}$

CLAIM NO. 22

CLAIMANT, DR. AND MRS. RICHARD D. MARTIN

Box 637, Crowheart, Wyoming 82512

Total Acres claimed: 80

Acres awarded: 53.6

Acre-feet Per Year Awarded: 161

Priority Date: April 27, 1905

E-1: *Township 4 North, Range 5 West of the W.R.M.*

Section 36: $W\frac{1}{2}NW\frac{1}{4}$ and $NW\frac{1}{4}SW\frac{1}{4}$

CLAIM NO. 23

CLAIMANT, ROBERT PERALTA

Red Creek Ranch, Crowheart, Wyoming 82512

Total Acres claimed: 456

Acres awarded: 306

Acre-feet Per Year Awarded: 918

Priority Date: April 27, 1905

Township 5 North, Range 5 West of the W.R.M.

Section 7: $SE\frac{1}{4}SE\frac{1}{4}$, Lot 6 ($SE\frac{1}{4}NE\frac{1}{4}$, $NE\frac{1}{4}SE\frac{1}{4}$), Lot 10 ($NW\frac{1}{4}SW\frac{1}{4}$), Lot 11 ($SW\frac{1}{4}SW\frac{1}{4}$), $SW\frac{1}{4}SE\frac{1}{4}$, Lot 8 ($NE\frac{1}{4}SW\frac{1}{4}$), $SE\frac{1}{4}SW\frac{1}{4}$

Section 8: Lot 6 ($SW\frac{1}{4}NW\frac{1}{4}$), $NW\frac{1}{4}SW\frac{1}{4}$, $SW\frac{1}{4}SW\frac{1}{4}$

Section 18: Lot 1 ($NW\frac{1}{4}NW\frac{1}{4}$), Lot 2 ($SW\frac{1}{4}NW\frac{1}{4}$), $NE\frac{1}{4}NW\frac{1}{4}$, $NW\frac{1}{4}NE\frac{1}{4}$

CLAIM NO. 24

CLAIMANT, LANDIS WEBBER
FOR RED CREEK CATTLE COMPANY

Wyoming 82512

Total Acres claimed: 274

Acres awarded: None

Acre-feet Per Year Awarded: None

Township 8 North, Range 2 East of the W.R.M.

Section 5: Lot 2 ($NW\frac{1}{4}NE\frac{1}{4}$)
Lot 3, $SE\frac{1}{4}NW\frac{1}{4}$

CLAIM NO. 25

CLAIMANT, BERTHA LEE JONES

Wyoming

Total Acres claimed: 240

Acres awarded: None

Township 9 North, Range 2 East of the W.R.M.

Section 35: $SE\frac{1}{4}NW\frac{1}{4}$, Lot 1 ($NE\frac{1}{4}NW\frac{1}{4}$), $W\frac{1}{2}SE\frac{1}{4}$, $W\frac{1}{2}NE\frac{1}{4}$

CLAIM NO. 26

CLAIMANT, GRACE GRABOSKI

Wyoming

Total Acres claimed: 200

Acres awarded: None

Township 9 North, Range 2 East of the W.R.M.

Section 35: Lot 3 ($SE\frac{1}{4}NW\frac{1}{4}$), $W\frac{1}{2}SW\frac{1}{4}$, $E\frac{1}{2}SW\frac{1}{4}$

DONE this —— day of June, 1984.

BY THE COURT:

_____

District Judge

PART II

DISPOSITION OF UNADJUDICATED CERTIFICATES

(OTHERWISE REFERRED TO AS EXPIRED PERMITS)

In recognition of their status under Wyoming law, I have dealt with these matters in the following way:

1. On October 21, 1981, I conducted an informal conference in Cheyenne with counsel for the Tribes, the United States and the State of Wyoming, concerning these unadjudicated permits, expired or otherwise. The State Engineer was present and suggested a procedure whereby his office would begin an administrative review of the status of each permit and, after appropriate notice to the owner(s) thereof, begin proceedings to sort the permits by their legal status and the type of action required to deal with each. The purpose of this was to remove clutter from the office of the State Engineer, an observation made by many counsel in these proceedings. Counsel for the United States and the Tribes agreed to the procedure, and I requested the State Engineer to begin his office examination.

2. Sometime in 1982, the State Engineer began his analysis, consisting of the following:

(a) Identification of the name and address of the current owner(s) of lands served by each permit with reference to tax records, BIA land title indices and similar documents;

(b) Mailing of a letter and response form to each owner(s) by certified mail (sample copies of the letter and form sent to each owner are attached hereto as Exhibit B); and

(c) Tabulation of the permits based on the response (or lack thereof) received from each owner and further based upon an examination of the State Engineer's records concerning each permit.

3. Each of the approximately 3,000 uncancelled permits in Water Division 3 were to be categorized by the State Engineer as one of the following:

(a) *"Doubtful" Permits*: Those permits which either:

(1) appear to be in good standing as all notices required to be filed with the State Engineer have been filed; or

(2) those in doubtful standing in the State Engineer's records in that one or more of the required filings appear to be incomplete, inadequate or have not been made, but the owner(s) of land served by said permits have indicated an intent to prove historic irrigation pursuant to the terms of the permit;

(b) *"Expired Permits"*: Those permits which do not appear to be in good standing in the records of the State Engineer and for which the owner(s) of lands served thereby have not responded to the State Engineer's letter or have indicated that no irrigation has occurred in accordance with the terms of the permit; and

(c) *"Unripe Permits"*: Those permits for which the time for filing all notices has not yet run or for which the time for filing said notices has been extended.

4. On February 8, 1983, I held an informal pretrial conference with counsel for the Tribes, the United States, the State of Wyoming and many private parties. At the conference, the State reported that the State Engineer had thus far sent approximately 840 letters and that it would require at least one year to complete the identifica-

tion of current owners, the sending of letters, and the tabulation of the responses into one of the categories described above. As of the date of the filing of this Supplemental and Final Report (June 1, 1984), there has been no request for hearings to cancel expired permits that are now "ripe" for cancellation.

With respect to the above unadjudicated permits, I respectfully recommend that:

1. The Court enter its order directing the State Engineer to continue his work and to report the results thereof directly to the Court; and

2. Upon receipt of the State Engineer's report:

(a) A Special Master should be appointed in the future, pursuant to Rule 53, W.R.C.P., to conduct hearings concerning the "doubtful" permits; or in lieu thereof, the Court should direct the State Board of Control to serve as a Special Master for this purpose; and at the conclusion of these hearings, the Special Master or the State Board of Control should recommend that each permit should either be adjudicated into a certificate of appropriation, or be cancelled;

(b) After publication of a listing of the "expired" permits and the passage of a reasonable time in which to object, if no objections are heard, the Court should enter an order cancelling the "expired" permits; and

(c) Proceedings concerning the "unripe" permits should be deferred until such time as actions may be appropriate.

PART III

THE CONFIRMING OF ADJUDICATED CERTIFICATES

1. Shortly after the Court's 1979 referral to me as Special Master, I began to conduct proceedings concerning the state-awarded water rights which are the subject of this and its predecessor Report.

2. At the September 24, 1979 Pretrial Conference held in Cheyenne, I ruled that certificates of appropriation issued by the Wyoming Board of Control constituted a prima facie evidence of a water right and, further, the contents of said certificates were presumed to be true and correct until rebutted by other evidence. During the fall of 1979, Wyoming introduced, and I received into evidence, certified copies of all adjudicated certificates of appropriation in Water Division 3 as well as what is known as the Baldwin Creek Decree.

3. While the United States and the Tribes originally sought to challenge the validity of many of these certificates, they ultimately reached a stipulation with the State and counsel for many of the private parties. That stipulation, adopted and approved by me, provided for the provisional conformation of all adjudicated rights subject to the terms of that stipulation. It provided as follows:

> 1. Neither the United States nor the Tribes will raise objections to provisional confirmation of adjudicated rights until after the reserved rights and any of the water rights under Federal law of the United States and the Tribes has been determined by the Master and District Court. No challenge to the United States' or the Tribes' adjudicated rights under Wyoming law shall be made by any party until after the determination of the rights as stated above.

2. After determintaion of the Tribes' and United States' rights, the Tribes, United States, Wyoming, and any other party shall have a reasonable period of time in which to contest before the Master any provisionally confirmed adjudicated right. The Tribes and the United States may contest only rights which have a higher priority than their reserved rights or other rights held under Federal or State law, and which may have an adverse impact on the exercise of such rights. No such challenge by the Tribes or United States shall result in any change in quantity of water or priority dates for rights of the Tribes, and the United States as determined by the Master and the Court, such matters being left to appeal procedures.

3. The procedures for making such a challenge shall be as follows:

(a) The party asserting the challenge shall have a reasonable time to serve notice in accordance with Wyoming Statute 41-3-401(c), and additionally, upon all counsel of record. The notice shall include:

(1) the permit number and the certificate of appropriation number of each right challenged;

(2) the name and address of the last known holder of each challenged right;

(3) a brief statement of the specific factual basis for each challenge;

(4) the identity of the right of the challenging party which is junior to and which upon which the challenged right has an adverse impact.

(b) As soon as is convenient after notice is served, each challenge shall be set for hearing

by notice specifying the rights to be heard on each date. The hearings on the challenges shall be set sufficiently in advance so as to preserve to each party the right to discovery pursuant to the Wyoming Rules of Civil Procedure.

(c) The party asserting the challenge shall have the burden of proving facts sufficient to show abandonment, forfeiture or reduction of the challenged right pursuant to Wyoming law.

(d) Any hearing conducted pursuant to the Stipulation shall be governed by Wyoming Rules of Civil Procedure.

In conclusion, with respect to the adjudicated rights, I respectfully recommend that said rights be provisionally confirmed, subject to the terms of the aforementioned stipultaion. This motion for confirmation was urged upon me vigorously by several special counsel for the State of Wyoming and it is recommended herein even though I have failed to find, through many hours of research, how an adjudicated water right within the State of Wyoming can be made any stronger by having been confirmed by an act of a District Court. But this matter is not before me nor the Court for philosophic observation.

June 1, 1984

The Honorable Alan Johnson, Judge
District Court, First Judicial District
19th and Carey Avenue
Cheyenne, Wyoming 82001

Sir:

This Supplemental and Final Report, together with Findings, Conclusions and Recommended Decree, are,

Respectfully submitted,

Teno Roncalio
Special Master

TR:vlh
Enclosures

88-309

No. 88-

Supreme Court, U.S.
FILED
AUG 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF WYOMING,

Petitioner,

v.

UNITED STATES OF AMERICA, SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, *et al.*,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

VOLUME II

(Pages 367a-808a)

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August 19, 1988

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IN THE DISTRICT COURT
OF THE FIFTH JUDICIAL DISTRICT
STATE OF WYOMING

Civil No. 4993

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE BIG HORN SYSTEM AND ALL OTHER SOURCES, STATE OF WYOMING.

Teno Roncalio, Special Master

REPORT

Concerning Reserved Water Right Claims
By and On Behalf of the
Tribes of the Wind River Indian
Reservation, Wyoming

December 15, 1982

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LAND DEFINITIONS

TYPES—USED TO TYPE IRRIGATED LANDS

TYPE I —INTENSIVELY IRRIGATED CROPLAND.

Usually have an adequate or nearly adequate water supply. Generally devoted to raising row crops or crops in rotation. Irrigation systems are generally well developed and maintained.

TYPE II —IRRIGATED CROPLAND WITH AN ADEQUATE WATER SUPPLY.

Generally devoted to raising hay crops or hay, small grains and pasture. Irrigation systems may not be as well developed and maintained as Type I.

TYPE III —MEADOW IRRIGATION.

Usually have an adequate early season water supply and may have an adequate year around supply. Usually located at higher elevations and are devoted to raising native or improved grass-legume hay. Irrigation systems are generally poorly developed and continuous irrigation is common.

TYPE IV —OCCASIONALLY IRRIGATED, PARTIAL SERVICE.

Lands irrigated sporadically or irregularly by water sperading systems or by conventional systems. Water supply may be limited. Native hay and pasture are the usual land uses.

TYPE V —SUBIRRIGATED OR "SEEPED" LANDS.

Also referred to in this case as "Circle V" lands. Are not intentionally irrigated by receive sufficient water from adjacent irrigated lands, canals, and/or from streams to provide beneficial use.

TYPE VI —Lands irrigated sporadically or irregularly by conventional systems. They are poor quality and require a higher level of irrigation management. Water supply is adequate. Native hay and pasture are the usual land uses.

TYPE VII —IDLE LANDS.

Lands once irrigated but not being currently used for irrigated crops.

TYPE VIII—UNDEVELOPED ARABLE LANDS WITHIN WIND RIVER FEDERAL IRRIGATION PROJECTS (FIP's).

Lands which have never been developed but which are of a type capable of production, located near an existing water delivery system.

CLASSES—USED TO CLASS ARABLE LANDS

CLASS 1 —Lands of high quality for irrigation which will yield high returns with minimum production and management costs.

CLASS 2 —Lands of good quality with only minor deficiencies.

CLASS 3 —Lands of fair quality having more serious deficiencies than Class 2 lands.

CLASS 4 —Lands of marginal quality for irrigation, suitable mainly for shallow rooted crops or pasture.

CLASS 5 —Lands which have been placed into a deferred status pending further investigation.

CLASS 6 —Lands which do not meet the minimum standards or requirements for arability under the Land Classification Standards used by HKM, and are non-arable.

PART ONE

I. INTRODUCTORY STATEMENT

This is a lawsuit brought by Wyoming to adjudicate all rights to the use of water in the Big Horn River system and all other sources within Water Division No. 3 of the State.

Water Division No. 3 is for all practical purposes identical with what is known as the Big Horn River drainage basin. By statutory definition it also includes the Clark's Fork drainage and tributaries. It includes many Federal entities, the largest being the Wind River Indian Reservation, and the Shoshone and Big Horn National Forests. Others include the East Fork Winter Elk Pasture, the Sheridan County Elk Winter Pasture, The Yellowtail Wildlife Habitat Management Area, the Middle Creek Drainage Area of Yellowstone National Park, the Big Horn Canyon National Recreation Area, and numerous water public reserves, water wells and stock driveways upon Federal lands administered by the Bureau of Land Management (BLM).

Division 3 also includes all tributaries to the Wind River. The Wind River travels from its origin southeasterly, draining the eastern slopes of the Continental Divide and westerly inclines of the Owl Creek Mountains. It then curves south of the Riverton area and begins a route northeast to the Montana line. As it travels through the geologically famous canyon north of Boysen Reservoir, its name becomes the Big Horn. Division 3 includes the remainder of its course and all of its tributaries in Wyoming.

The evidence is undisputed that Wyoming has traditionally administered water laws in full accord with her statutory doctrine of prior appropriation—first in time, first in right. State officials have brought administrative and judicial proceedings to cancel water rights they knew

to be totally nonused or otherwise in violation of State law.[1] Wyoming requires annual reports from her water officials within the province of the State Engineer, and requires reports of County officials regarding water usage in their particular jurisdictions.

Water Division 3's Chief Administrative Officer is a Superintendent directly responsible to the State Engineer. He has several people working under him who are water commissioners or hydrographers, and the State employs one such hydrographer in Division 3. The rest of the employees concerning the distribution of the use of water in Wyoming are called water commissioners, and are employed by the County. There are approximately 11 so employed in Water Division 3. In addition to his chief duties within the Division, a Water Division Superintendent sits as a member of the State Board of Control. Wyoming is divided into four such Water Divisions and those Commissioners, plus the State Engineer, constitute her Board of Control.[2]

Excluding the United States, as trustee for the Tribes, and the Wind River Indian Reservation Tribes, several thousand defendants in this action hold an interest in over 812,000 acres of farm and ranch lands in the Big Horn Basin of Wyoming (Division 3). In rounded figures as of the end of 1981, about 653,513 acres received water by virtue of adjudicated rights and 158,217 by permits (unadjudicated rights).[3] Volumes delivered vary, of course, from year to year depending upon nature and priority dates involved.

A Commissioner's duty is to deliver water to appropriators entitled to water in priority. On years of "abundant" water, defined as flowing stream water in excess of that amount necessary to satisfy all existing

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[1] Tr. p. 121, November 26, 1979.

[2] Plaintiff's Exhibit AP-3, see Tr. p. 157, November 26, 1979.

[3] Tr. p. 15255.

pre-1945 appropriations on said stream, appropriators may take an additional cubic foot per second over and above the statutory limitation or quantification of one cubic foot per second per seventy acres.[4] In such areas on given wet years, there is a minimum of regulation and supervision. In years of scarcity or low flows, regulation and supervision increases accordingly.[5]

Nothing in Wyoming's laws provides a right to the use of water for any Federal entity unless that right conforms to State law as in the case of any other water user. In other words, Wyoming does not recognize a reserved right inuring to the benefit of the United States, whether as a proprietor or as a guardian of installations or of peoples located within Water Division 3. This is an accepted fact that has existed since the adoption of the Wyoming State Constitution by Congress and her admission as a state in 1890.

Federal officials in charge of the first irrigation and reclamation projects in Wyoming understood this western water concept and filings were made in the office of the State Engineer for the irrigable acreage of the respective Federal projects as each was established in Wyoming.[6] As is later detailed in several portions of this Report, with the opening of the ceded land of the Wind River Indian Reservation in 1905 and its settlement by non-Indians, there began to be filings in the State Engineer's office for certain Indian lands in behalf of Indians in the "diminished" or remaining portion of the Reservation.

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[4] W.S. 41-4-320.

[5] Christopulos, Tr. 121 *et seq.* See also W.S. 41-4-317, 318.

[6] The northern portion of Division No. 3 contains one of the first Federal irrigation projects in the Nation, the Shoshone Project authorized by the Secretary of Interior, February 19, 1904. It is served by State awarded water rights which date from November 5, 1905. One of the first irrigation districts in the Nation, far predating the Federal projects, is the Cody Canal served by State water rights dating as early as 1896.

A. THE *WINTERS* DECISION

About this same time, controversy between settler and Indian came to a head in Montana and grew into a dispute that found its way to the United States Supreme Court in 1907. On January 6, 1908, the United States Supreme Court in *Winters v. United States*, passed down a decision which is still reverberating throughout the western United States.[7]

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[7] *Winters v. United States*, 207 U.S. 564 (1908). For a thorough discussion of this momentous matter and its effect, see Scott M. Matheson, Jr., "Indian Reserved Water Rights," The *Winters* of Our Discontent, 88 Yale Law Journal, 1698-1712 (1979). I am indebted to Professor John Hinckley of Powell, Wyoming, for Volume XIII, Western Historical Quarterly No. 1, published by Utah State University, with an article by Norris Hundley Jr., entitled "The Winters Decision and Indian Water Rights, a Mystery Reexamined" (1982). This article provided the following "sampling" of "decisions and literature stemming from *Winters* reflecting the confusion and documenting the larger importance of the Indian water rights question for the nation" [S]ee *Conrad v. United States*, 161 F. 829 (9th Cir. 1908); *United States v. Walker Irrigation District*, 104 F.2d 334 (9th Cir. 1939); *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956); *Arizona v. California*, 373 U.S. 340 (1963); Harold A. Ranquist, 'The *Winters* Doctrine and How It Grew: Federal Reservation of Rights to the Use of Water,' *Bringham Young University Law Review*, 3 (1975), 639-724; Michael C. Nelson and Bradley L. Cooke, 'The Winters Doctrine; Seventy Years of Application of 'Reserved' Water Rights to Indian Reservations,' *University of Arizona Arid Lands Resource Information Paper No. 9* (Tucson, 1977); Edward W. Clyde, 'Indian Water Rights,' Robert Emmet Clark, ed., *Waters and Water Rights: A Treatise on the Law of Waters and Allied Problems* (7 vols., Indianapolis, 1967-1976), II, 373-99; James L. Merrill, 'Aboriginal Water Rights,' *Natural Resources Journal*, 20 (January 1980), 45-70; Rupert Costo, 'Indian Water Rights: A Survival Issue,' *Indian Historian*, 5 (Fall 1972), 4-6; William H. Veeder, 'Water Rights: Life or Death for the American Indian,' *Indian Historian*, 5 (Summer 1972), 4-9; Rosaile Martone, 'The United States and the Betrayal of Indian Water Rights,' *Indian Historian*, 7 (Summer 1974), 3-11; William H. Veeder, 'Indian Prior and Paramount Rights to the Use of Water,' *Rocky Mountain Mineral Law Institute Proceedings*, XVI (1971), 631-68; Paul Bloom, 'In-

Pages of this report and many hours of the trial in this adjudication are devoted to the proposed final application of that doctrine in Wyoming. The State argues that there is no reserved right for Indians and, if any, their reserved rights date is the date of State awarded permits granted to them prior to and during the *Winters* Doctrine era. The United States and the Tribes argue that the *Winters* Doctrine results in an entitlement with an 1868 priority date to the Indians of water for all of its historically irrigated lands plus an award of water in quantities to irrigate all practicably irrigable acres on the Reservation, twenty percent (20%) thereof for future generations, plus reserved water for other uses.[8] *Winters* provides that a reservation of water in favor of Indians will be implied from the Treaty whereby the Indians, having the right to occupy and use vast areas of land, ceded to the United States all those lands except the relatively small tract which was set apart for their Reservation. As is usual in such magnificent pronouncements, there was no actual quantification of water, nor

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dian "Paramount" Rights to Water Use,' ibid., 669-93; Monroe E. Price, *Law and the American Indian: Readings, Notes and Cases* (Indianapolis, 1973), 310-29; Eva H. Morreale, 'Federal-State Rights and Relations,' Clark, ed., *Waters and Water Rights*, II, 59-61; Wardlaw, 'Irrigable Acres Doctrine,' 375-84; Robert D. Dellwo, 'Indian Water Rights—The Winters Doctrine Updated,' *Gonzaga Law Review*, VI (1971), 215-40; Harry B. Sondheim and John R. Alexander, 'Federal Indian Water Rights: A Retrogression to Quasi-Riparianism?,' *Southern California Law Review*, XXXIV (1960), 1-61; Peter C. Maxfield, Mary Frances Dieterich, and Frank Trelease, *Natural Resources Law on American Indian Lands* (Boulder, Colorado, 1977), 207-38; John Patterson, 'Extent of Indian Water Rights on Reservations in the West,' *Rocky Mountain Law Review*, XVIII (1946), 427-30; Richard L. Forman, *Indian Water Rights: A Public Policy and Administrative Mess* (Danville, Illinois, 1981)."

[8] For a detailed statement of claims of the Tribes and of the United States on behalf of the Tribes, see infra, (Indian Claims); also, see summary under "Groundwater", infra.

a rule provided to serve as a guide in scope or effect in litigation such as this.

Winters held that the Treaty date—in Water Division 3 this would be July 3, 1868—implicitly reserved from appropriations under State law an amount of water sufficient for irrigation purposes, "which would be necessarily continued through the years, its priority relating back to the Treaty date." *Winters* rejected the notion that Congress' admission of the State to statehood abrogated the reservation of waters.

For over 100 years citizens of the Territory and of Wyoming in the Big Horn Basin have lived either adjacent to Indians near or on ceded lands within the parameters of the Indian Reservation, or downstream of the Reservation along the remainder of what is known as the Big Horn Basin, northward to the Montana Line. In 1905 the Riverton Reclamation Project and ongoing homestead laws brought thousands of non-Indian settlers to the area. In a few instances over the decades, Indians who had taken lands in fee under the General Allotment Act, had conveyed to non-Indians, thus creating yet another class of water users with unique legal problems of their own.

As stated in the Scott M. Matheson, Jr., treatise referred to on several occasions in this report, the water law system of Wyoming cannot "readily accommodate the *Winters* Doctrine because the Indian reserved right is not limited by the same conditions as an appropriation right." Legal recognition of the Indian reserved right occurred 75 years ago, but important questions about the right's basic elements continue to remain unanswered and cause numerous serious, continuing disputes. "Neither courts nor legislatures nor agencies have defined the two key elements of the *Winters* right: its scope, including quantity of water effected and the priority of that right in its uses, including transferability of the right and permissible applications of *Winters* water on

the Indian Reservation, and on ceded portions no longer in control of the Reservation." [9]

In 1975 on lands originally ceded in 1905, and long since conveyed to non-Indian ownership, currently used as the Riverton Municipal Airport, authorities planned the drilling of water wells to augment supplies for the airfield and a proposed industrial park. They were notified by Tribal authorities that the Wind River Indian Reservation asserted a claim upon groundwaters under the Riverton Municipal Airport as a part of their "*Winters*" water and objected to such drilling.[10]

Thus, once again, the original, unresolved fundamental dispute that has existed in the Rocky Mountain West for over 70 years asserted itself in Wyoming. While a general deterioration of communication between the Wind River Indian Reservation Indians and the non-Indians of Fremont County may have been a factor, it was a minimal one. It was obvious that an adjudication was at last necessary which would once and for all quantify, define, and integrate the rights of all people, Indian and non-Indian, to the use of waters in Water Division 3. It is appropriate that such an adjudication take place here.

It was in the above fertile soil of a justiciable dispute in Wyoming, and a century old, unanswered determination throughout the entire Rocky Mountain West, that the seeds of controversy were planted, out of which this action grew.

B. A NOTE ON JURISDICTION

Although the matter of jurisdiction has been reserved on appeal, it is necessary to include the following matters in support of jurisdiction vesting in the Courts of the State of Wyoming for a general mainstream adjudica-

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[9] Indian Reserved Water Rights: the *Winters* of Our Discontent, 88 Yale Law Journal, 1689, (1979).

[10] Mr. Long, City Manager, Riverton, Tr. p. 13573.

tion quantifying the rights on all Federal enclaves within Division 3 of the State of Wyoming.

The issue here stems from the fact that Wyoming, as with most other Western states, has what is called "specific disclaimer" language in her Constitution.[11]

Because the subject matter of this litigation is the right to the use of water and not a matter directly affecting possession, control, taxation or ownership of land, it is my opinion that due to the McCarren Amendment, jurisdiction does lie with the state to adjudicate and to quantify water rights of all the users in Wyoming, though they may be Federal wards or residing on lands that are specifically excluded from the jurisdiction of the State of Wyoming. The McCarren Amendment is the basis for bringing this legislation and so long as the general mainstream adjudication is a comprehensive one, which it has been in this case, we believe jurisdiction is solid.

This is not withstanding the recent decisions, *San Carlos Apache Tribes v. State of Arizona* (decided February 23, 1982), and *The Northern Cheyenne Tribe vs. Adsit* (decided February 22, 1982), both in the United States Court of Appeals for the Ninth Circuit.[12]

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[11] Wyoming Constitution, Article 21, Section 26, reads in part: "The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States the same shall be and remain subject to the disposition of the United States and that said Indan lands shall remain under the absolute jurisdiction and control of the Congress of the United States. . ."

[12] *San Carlos Apache Tribe of Arizona v. State of Arizona*, 668 F.2d 1093 (C.A. Ariz. 1982); *The Northern Cheyenne Tribe v. Adsit*, 668 F.2d 1080 (C.A. Mont. 1982).

In said cases, the United States and various Indian tribes appealed from Orders entered by the respective Federal District Courts dismissing actions brought to adjudicate Federal and Indian water rights in Federal Courts in favor of the State Court proceedings which were then under way. The Appellate Court held that the McCarren Amendment did not grant jurisdiction and invoked the language which expressly disclaimed jurisdiction over Indian *lands*, contained in the Constitution and enabling acts of the two states involved, Arizona and Montana. I have deliberately underlined the word "lands".

I respectfuly urge that the disclaimer does not state that "the right to the use of water" is disclaimed. The disclaimer runs to *land* only.

In the *Adsit* case cited above, a dissenting opinion by Judge Merrill was read with interest because of its direct bearing on these proceedings. Judge Merrill concurred with the District Court and stated that a water adjudication is essentially a local concern and in every western state water scarcity poses a problem not just to Indians, but to everyone. In his view it is highly important that each state be accorded room for an effort to solve its water scarcity problems in the manner it regards as most appropriate. His language which has direct relation on this case is as follows:

> ". . . here as long as Montana gives recognition to Indian water rights and their establishment pursuant to Federal law, I see no good reasons why Indians should not be joined with all other water users in the state in order to achieve a comprehensive state adjudication."

The last paragraph of this dissent is crucial. It begs the very question which turns on a state adjudication giving recognition to Indian water rights. This is one of the basic controversies in a general mainstream adjudication, the recognition that a federal reserved water

right is an *issue* in these matters, not a prerequisite to state jurisdiction.

Wyoming in this case begins its "defense" by not recognizing any Indian reserved water rights, but she is careful to continue by asserting that if these rights do exist, a careful application of strict proof, and of examination of the respective claim, is in order before they should be quantified, given a priority date, and recognized by any court, State or Federal.[13]

I believe jurisdiction is solidly within the State of Wyoming and should be preserved and confirmed on appeal because these proceedings have been in every manner a comprehensive general mainstream adjudication. In support of this statement, it is stressed that even basic State Permit 7300, which when issued in 1905 provided water for 300,000 acres, has since been reduced by the State Engineer to about 100,000 acres when these proceedings began. Upon closer examination by State Engineer George Christopulos in these proceedings, State Permit 7300 has further been reduced to now serve less than 70,000 acres.[14]

Similarly, at least seventeen adjudicated state water rights have been found to be abandoned and recommended to be cancelled as a result of the adjudication which began in the upper reaches of Water Division 3.[15] Had it not been for the stipulation which the United States and the Tribes entered into with the State, which made moot any further examination of right by right adjudicated water rights in that area pending my ruling on Boundaries and Dates, we would have proceeded to examine each and every water right in Water Division 3 as carefully as was initiated in the beginning of these

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[13] See Section entitled "Futures", infra.

[14] Tr. p. 15239. Permit 7300 is the "foundation" permit for the Riverton Reclamation Project.

[15] See Masters Exhibit No. 1, and State Engineer's letter amendment thereto, showing abandoned rights.

proceedings. The stipulation removed the need for the continuance of such an examination.

For this reason, I believe Wyoming has a right under the McCarren Amendment to conduct these proceedings, and hope that this vital adjudication of the right to use water in Water Division 3 not become a nullity by a ruling of any court that the State disclaimer serves to repeal the McCarren Amendment.

The Ninth Circuit cases cited above are in direct conflict with the Tenth Circuit, whose thorough opinion on June 22, 1979 serves to buttress the position of valid jurisdiction of this case in Wyoming courts.[16]

II. HISTORY OF THE CASE

A. COMPLAINT AND SERVICE OF PROCESS

The complaint in this massive and difficult matter was filed in the District Court of the Fifth Judicial District of Wyoming, in Worland, Washakie County, on January 24, 1977, by Wyoming Attorney General V. Frank Mendicino, acting "on behalf of the State of Wyoming and under the direction of the Governor of the State of Wyoming. . . ." The origin of this case lies in legislative actions taken by the United States Congress in 1952 and the Legislature of the State of Wyoming in 1977.

With the passage in 1952 of the so-called McCarran Amendment,[17] Congress waived the sovereign immunity of the United States "in any suit (1) for the adjudication of rights to the use of water of a river system or other source; or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by ap-

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[16] *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116 (1979), *Cert denied*, 444 U.S. 995 (1979).

[17] 43 U.S.C. Section 666.

propriation under state law by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit."

Twenty-five years later, in preparation for this litigation and in an effort to perfect service and further secure jurisdiction over the United States and the Shoshone and Arapahoe Indian Tribes in her courts, Wyoming considered and enacted the jurisdictional statute under which this case has proceeded. The unanimity by which it became law is, I believe, noteworthy. The legislation was introduced as Original House Bill 188 on January 14, 1977, at which time it was referred to the House Committee on Agriculture, Public Lands and Water Resources. Three days later the Bill was reported from Committee without amendment and considered for the first time by the full body. On January 20 it passed the House 58 to 2 and was sent to the Senate, where it was read for the first time the following day. At that time the Bill was sent to the Senate Committee on Agriculture, Public Lands and Water Resources. It was reported out of Committee to the Senate floor the very same day and passed both second and, under suspension of the Senate Rules, third reading on January 22, 1977, without a dissenting vote. The Bill, still without amendment to its original form, was enrolled and engrossed, signed by the Speaker of the House and the President of the Senate, and then signed into law by the Governor on that same day. This litigation was commenced two days later with the filing of the complaint in the District Court at Washakie County, confining its scope to Wyoming Water Division No. 3.

The jurisdictional statute as passed by the Legislature provides as follows:

> Section 1-37-106. *Adjudication of water rights.*
>
> (a) The state of Wyoming upon the relation of the attorney general may institute an action to have

determined in a general adjudication the nature, extent, and relative priority of the water rights of all persons in any river system and all other sources, provided:

(i) For the purposes of this section:

(A) The term "general adjudication" shall mean the judicial determination or establishment of the extent and priority of the rights to use water of all persons on any river system and all other sources within the state of Wyoming. The court conducting such a general adjudication shall:

(I) Certify to the state board of control those legal and factual issues which the court deems appropriate for the board to determine. Upon such certification, the board shall exercise those powers and follow those procedures set forth in Rule 53 of the Wyoming Rules of Civil Procedure;

(II) Confirm those rights evidenced by previous court decrees, or by certificates of appropriation, or by certificates of construction heretofore issued by the the Wyoming state board of control;

(III) Determine the status of all uncancelled permits to acquire the right to the use of the water of the state of Wyoming and adjudicate all perfected rights thereunder not theretofore adjudicated under W.S. 41-211 [Section 41-4-511];

(IV) Determine the extent and priority date of and adjudicate any inter-

est in or right to use the water of the river system and all other sources not otherwise represented by the aforedescribed decrees, certificates, or permits;

(V) Establish, in whatever form determined to be most appropriate by the court, one or more tabulations or lists of all water rights and their relative priorities on the river system and all other sources;

(B) The word "person" shall be construed to mean an individual, a partnership, a corporation, a municipality, the state of Wyoming, the United States of America, or any other legal entity, public or private;

(ii) When the potential defendants number one thousand (1,000) or more, personal service of a summons and complaint shall not be required and (A) the court shall order that the clerk obtain service on known potential defendants by mailing a court-approved notice of the action by certified mail, return receipt requested, and (B) the court shall order that the clerk obtain service on all unknown parties by publication of said notice for four (4) consecutive weeks in a newspaper published in each of the counties within which interests in and rights to the use of water may be affected by the adjudication. If there is no newspaper in one (1) or more of said counties, then publication for such counties shall be in one (1) or more newspapers published in the state, and of general circulation within said counties. If publication is in a daily newspaper, one (1) insertion a week shall be sufficient;

> (iii) The complaint for such a general adjudication shall be captioned: "In re the General Adjudication of All Rights to Use Water in the ———— River System and All Other Sources, State of Wyoming";
>
> (iv) When the water rights to be determined are located in more than one (1) county, the general adjudication may be brought in any of the counties.

In accordance with the terms of the statute and with the approval of the Court, service of process was accomplished through mail and publication on the many water rights holders involved and by order of Judge Harold Joffe, service was accomplished on several thousand known water rights holders affected by the action through certified mail, return receipt requested, while all unknown defendants were served by publication pursuant to the newly-enacted provision. The Court ordered publication for four consecutive weeks in newspapers published in Natrona, Fremont, Johnson, Washakie, Hot Springs, Park, Big Horn, Sheridan, Sublette, and Teton Counties.

On February 22 1977, the Department of Justice filed in the United States District Court for the District of Wyoming a petition for removal of the case from the State District Court at Worland to the U.S. District Court in Cheyenne, contending:

> The United States is a party to this action and its rights and those of the Shoshone and Arapahoe Indian Tribes of the Wind River Indian Reservation, Wyoming, under federal law have been made an issue by the complaint in this action. Determination of the extent and priority of the water rights held by the United States in the Big Horn River system both on its own behalf and on behalf of the Shoshone and Arapahoe Indian Tribes will involve substantial and important questions arising under the construction, (sic) laws, and treaties of the United States.

Subsequently, and on motion of the State of Wyoming and two private parties, Mr. Landis Webber and the Owl Creek Ranch, Federal Judge Ewing T. Kerr remanded the case to the State Court of Washakie County, concluding that the jurisdictional statute enacted by the Wyoming Legislature providing for adjudications, such as this, fulfills the requirements of the McCarran Amendment that sovereign immunity is waived in such actions where state courts can undertake a comprehensive adjudication of water rights. Judge Kerr concluded:

> In the instant case the congressional policy underlying the McCarran Amendment, the policies enunciated by the Supreme Court, and the procedural defects in the federal governments' removal petition all combine to cast sufficient doubt over the propriety of removal so as to warrant a remand of this cause to the state court.

Significantly, Judge Kerr's order also recognized previous decisions of the United States Supreme Court, holding that Indian water rights are included among those federal rights which may be adjudicated in a state court under the terms of the McCarran Amendment.[18]

With the matter remanded, the United States then filed a motion to dismiss the complaint. Said motion to dismiss was argued by the United States on the following bases:

> (1) that the procedure established under Wyoming law for the adjudication did not fit within the

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[18] *In Re Bear River Drainage District*, 267 F.2d 847 (10th Cir. 1959); *New Mexico v. United States*, Civil No. 76-041 (D.N.M., April 21, 1976); *State ex rel. Reynolds v. United States*, 408 F.Supp. 1029 (D.N.M. 1975); *Four Counties Water Users Ass'n. v. Colorado River Water Conservation District, et al.*, Civil No. 8880 (D.Colo., April 12, 1965); *In re Green River Drainage Area*, 147 F.Supp. 127 (D. Utah 1956); *In re Chiliwist Creek and Its Tributaries*, Civil No. 2491 (E.D. Wash., May 29, 1964).

meaning of the term "suit" as contemplated by the McCarran Amendment;

(2) that under the terms of the State jurisdictional statute the adjudication was to be submitted for decision to the State Board of Control, and that such agency of the State government was not in a position to render an unbiased and fair decision in the case; and

(3) that certain provisions of the Wyoming Constitution preclude the Court from exercising jurisdiction over the waters involved in this adjudication.

In support thereof, the Shoshone and Arapahoe Indian Tribes sought leave of the Court to file a brief *amicus curiae*, which motion was granted despite formal opposition of the State of Wyoming. In its *amicus* brief, the Tribes argued that because of a conflict of interest between the United States and the Indian rights, the U.S. could not adequately represent the Tribes as their trustee. Additionally, the Tribes asserted that in this action they are an indispensable party and that inasmuch as the McCarran Amendment does not waive the sovereign immunity of the Tribes, they are not subject to service of process and cannot be involuntarily joined in the action. Therefore, the brief concluded "that the Court, *sua sponte*, should dismiss the case for lack of jurisdiction over a necessary party."

In a written opinion issued December 20, 1977, Judge Joffe rejected all such arguments of the United States and the Tribes, concluding, as did Judge Kerr in his earlier referenced order, that the provisions of the Wyoming jurisdictional statute do in fact provide for an adjudication of water rights within the meaning of the McCarran Amendment and that this State Court has jurisdiction over the matter. Among other conclusions, Judge Joffe determined that the Shoshone and Arapahoe Tribes are proper parties to the litigation, as the United

States is a proper party in its trustee relationship to the Tribes and that the Tribes are not indispensable parties to the litigation.

Concurrently with its consideration of the motion to dismiss, the Court considered as well a motion of the State of Wyoming for summary judgment as to the second and fourth affirmative defenses asserted by the United States in its answer. In those defenses the United States claimed that the Court is without jurisdiction over the subject matter of the action, insofar as the action relates to the adjudication of water rights of the Tribes, and that the case should be dismissed for failure to join an indispensable party. Within the same order denying motion of the United States for dismissal, Judge Joffe granted the motion of the State of Wyoming for summary judgment as to those defenses in the answer of the United States. Tribes preserved for appeal the issue of jurisdiction.

B. REFERRAL TO SPECIAL MASTER

With such jurisdictional matters disposed of, and the parties to the action aligned, the next issue concerned the question of whether or not the adjudication should be certified to the Board of Control of the State of Wyoming for trial. In pertinent part, the statute required said certification, and the State of Wyoming, on April 18, 1978, requested the Court certify the action to the Board of Control. On August 11, 1978, Judge Joffe signed the First Order of Certification and Referral to Wyoming State Board of Control. Subsequently, upon full consideration of objections to such referral raised by the Tribes and the United States, Judge Joffe altered his initial referral of the matter to the Board of Control, and on May 29, 1979, entered the First Order of Certification and Referral to a Special Master, Teno Roncalio of Cheyenne, Wyoming.

That document charged me with the duty to:

1. Determine the status of those rights which are evidenced by previous Court decrees, as set out in Appendix B to the Complaint herein, as well as those rights evidenced by certificates heretofore issued by the Board of Control, as set out in Appendix C to the Complaint herein, which Appendices may be revised to more accurately reflect the records of the State Engineer and State Board of Control.

2. Determine the status of all uncancelled permits to acquire the right to use of water as set out in Appendix D and Appendix E to the Complaint herein, which Appendices may be revised to more accurately reflect the records of the State Engineer and State Board of Control.

3. Adjudicate any interest in or right to use the water of the Big Horn River System and all other sources within Water Division No. 3, State of Wyoming, arising under the permits described in paragraph 2, above.

4. Determine the extent and priority date of the adjudicate (sic) any other interest in or right to use the water of the Big Horn River System within Water Division No. 3, State of Wyoming, not otherwise represented by the aforedescribed decrees, certificates, or permits, including, but not limited to, any appropriative or reserved rights of the Arapahoe Tribe, Shoshone Tribe, or of the United States in either its proprietary or fiduciary capacity, which may be hereafter identified by said Tribes or the United States and which are not the subject to the decrees, permits and/or certificates described in paragraphs 1 and 2 above.

The Reference directed procedures as set forth in Rule 53 of the Wyoming Rules of Civil Procedures, and ordered the first meeting of the parties be held in Worland,

Wyoming at the Junior High School at 9:30 a.m. on the 7th day of August, 1979.

The first Order on Motions then pending, and Establishing Schedule, was issued January 10, 1980.

The pretrial conferences following the first meeting dealt with disposition of many pleadings accumulated during the months of arguments on jurisdiction. Some dealt with procedural matters affecting time, a few on applications for depositions, motions to comply, or motions to compel response; others dealt with motions affecting a priority of schedule.

The most thorny item at this posture of the lawsuit was whether to first proceed with a water right by water right examination of each of the adjudicated and permitted water rights in Water Division No. 3, or to move directly on the quantification of the right to use water of the Wind River Indian Reservation. After due input, hearings began in Worland with an opportunity given to all attorneys of record, attorneys for the United States and the Tribes, and any party to these proceedings, to call up and to question whatever State water rights they wished. Thus began the adjudication of the right to use water in this Division. The adjudicated State water rights had been assembled in one publication [19] and Wyoming was vigorous in urging that these rights, totaling some 27,000 in number, be confirmed, with certain exceptions.[20]

The motion to confirm said adjudicated rights was held in reserve as hearings began to challenge rights which had been assembled in sets of approximately 2500 rights

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[19] Master's Exhibit No. 1, a Tabulation of Adjudicated Water Rights of the State of Wyoming, Water Division No. 3.

[20] The Harmony Canal Right, Tr. pp. 133, 141 *et seq.*, 11/27/79; to which were later mentioned rights in the name of Frank Hinckley and Glenn Neilson.

per set. It was determined that the rights farthest from the boundaries of the Indian Reservation should be called up first, and it was advertised and ordered that any interested party could call up any permit or adjudicated right for examination and make a record for the cancellation or reduction in quantity or right to the use of water of that particular right.[21]

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[21] To again assure that all parties holding state awarded water rights had due notice of the proceedings, an additional notice was agreed upon by counsel for the major parties, and was inserted in all weekly and daily newspapers in Water Division No. 3. It read as follows:

FINAL NOTICE TO ALL OWNERS OF
ADJUDICATED STATE WATER RIGHTS IN
DIVISION NO. THREE, STATE OF WYOMING

Beginning with hearings in October, 1979, attorneys for Wyoming presented evidence to support their motions to confirm all water rights (less a few specific exemptions) contained in a publication entitled "Tabulation of Adjudication Water Rights of the State of Wyoming, Water Division No. 3, 1978."

The first set contained approximately 2500 rights, and are located generally in the eastern-most portion of the Water Division. The second set, which was admitted into evidence at hearings in Worland May 5, contained approximately 3000 rights, and are located generally in the center of the Division, extending to the south boundaries thereof and southeast to the Gas Hills area. The third set of hearings will contain the remainder of the above adjudicated water rights and will be offered by the State of Wyoming for confirmation at some future date.

TAKE NOTICE THAT ON APRIL 18 AND AGAIN ON MAY 5TH, ATTORNEYS FOR THE UNITED STATES SERVED NOTICE THAT IN ADDITION TO REBUTTING STATE EVIDENCE IN SUPPORT OF CONFIRMATION OF THESE RIGHTS, THE UNITED STATES OF AMERICA NOW CHALLENGES THE VALIDITY OF ALL WATER RIGHTS IN WATER DIVISION NO. 3. THIS COULD OR COULD NOT AFFECT THE VALIDITY OF ALL WATER RIGHTS IN DIVISION NO. 3.

TAKE FURTHER NOTICE THAT THE NEXT HEARING REGARDING THE ABOVE WATER RIGHTS WILL TAKE PLACE IN WORLAND, WYOMING, ON JUNE 23 AT 10:00

Concurrent with the above, the United States filed its original Statement of Geographic Boundaries and, in response Wyoming served requests for admissions, interrogatories, and requests for production of documents dealing with said boundaries on all the Federal inholdings in Water Division No. 3. Wyoming demanded strict proof of boundary accuracies, and proof that the Executive Officers of the United States, whose signatures appeared upon documents creating said entities, acted within the scope of their authority. One Wyoming query alone contained 196 questions and a request for admission, 184 requests for answers, all dealing with the scope of authority question.[22]

I spare the Court the added bulk if not burden of including in this report any further materials dealing with the pleadings at this stage of the litigation. A series of stipulations, hereinafter mentioned, were entered into by any between the major parties agreeing upon the boundaries of the Wind River Indian Reservation, of the Yellowstone National Park within Water Division No. 3, of the Shoshone National Forest, of the Big Horn National Forest, of the East Fork Elk Winter Pasture, of the Sheridan County Elk Winter Pasture, of the Big Horn Canyon National Recreation Area, of public water reserves, of water wells, stock driveways and wildlife habitat management areas, and other reserves dealing

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A.M., AND SAID HEARINGS MAY CONTINUE FROM TIME TO TIME AFTER SAID DATE.

IF YOU HAVE NOT ALREADY MADE PROVISIONS FOR REPRESENTING YOUR RIGHTS IN THESE PROCEEDINGS, THIS WILL BE YOUR FINAL NOTICE TO DO SO.

DATED MAY 10, 1980.

[22] Tr. pp. 23-44, November 26, 1979. It should be noted that the United States was also turning out pleadings of massive proportions. One interrogatory asked 183 questions of Wyoming officials.

with other Federal enclaves within Water Division No. 3.

C. STIPULATION ON CONFIRMING RIGHTS

To these stipulations was added an additional agreement of all counsel to major parties herein, dealing with the confirmation of adjudicated rights, thus clearing the decks for the trial upon the questions contained in paragraph 4 of the reference.

The stipulation is as follows:

> 1. Neither the United States nor the Tribes will raise objections to provisional confirmation of adjudicated rights until after the reserved rights and any of the water rights under Federal law of the United States and the Tribes has been determined by the Master and District Court. No challenge to the United States' or the Tribes' adjudicated rights under Wyoming law shall be made by any party until after the determination of the rights as stated above.
>
> 2. After determination of the Tribes' and United States' rights, the Tribes, United States, Wyoming, and any other party shall have a reasonable period of time in which to contest before the Master any provisionally confirmed adjudicated right. The Tribes and the United States may contest only rights which have a higher priority than their reserved rights or other rights held under Federal or State law, and which may have an adverse impact on the exercise of such rights. No such challenge by the Tribes or United States shall result in any change in quantity of water or priority dates for rights of the Tribes, and the United States as determined by the Master and the Court, such matters being left to appeal procedures.
>
> 3. The procedures for making such a challenge shall be as follows:

(a) The party asserting the challenge shall have a reasonable time to serve notice in accordance with Wyoming Statute 41-3-401(C), and additionally, upon all counsel of record. The notice shall include:

(1) the permit number and the certificate of appropriation number of each right challenged;

(2) the name and address of the last known holder of each challenged right;

(3) a brief statement of the specific factual basis for each challenge;

(4) the identity of the right of the challenging party which is junior to and which upon which the challenged right has an adverse impact.

(b) As soon as is convenient after notice is served, each challenge shall be set for hearing by notice specifying the rights to be heard on each date. The hearings on the challenges shall be set sufficiently in advance so as to preserve to each party the right to discovery pursuant to the Wyoming Rules of Civil Procedure.

(c) The party asserting the challenge shall have the burden of proving facts sufficient to show abandonment, forfeiture or reduction of the challenged right pursuant to Wyoming law.

(d) Any hearing conducted pursuant to the Stipulation shall be governed by Wyoming Rules of Civil Procedure.[23]

Technically, this cleared the decks for launching the trial upon the claims of the United States, as trustee of

[23] This Stipulation appears in the transcript as read into the record by Mr. Sachse, Tr. p. 241, June 23, 1980.

the Tribes, except for one glaring reason for continued delay. That was the unprecedented number of documents and depth of inquiry during the interrogatory and discovery proceedings. A few words are in order to touch upon an abusive intrusion in the already much faulted discovery procedures in our judicial system.

It is not meant to add to the current outcry about interrogatory and discovery abuse and the need for reform. This is not the place for suggestions even if I had some. But in my lifetime, except for the Federal anti-monopoly cases recently dismissed or settled, and according to the memory of most counsel herein, no case in our experience has carried so many hours and so many thousands of pages of discovery proceedings involving unprecedented expense to parties on all sides.

Wyoming Supreme Court Justice C. Stuart Brown commented at the time of his swearing in that the discovery proceedings were rendering litigation a route to justice only for the rich, and was denying most citizens their right to courts of law. It is recognized that discovery is at the heart of the problem of delay and the high cost of litigation. Simon H. Rifkind, the Special Master in *Arizona v. California*, has declared that discovery proceeds today with no serious regulation, and that it has become in many areas of the law a "sporting match and an endurance contest." [24]

The complexity of the oncoming trial, the vast area for fact finding in agricultural and engineering analysis, scientific inquiry of acreage to be proven arable, thence irrigable, and finally practicably irrigable acres, resulted in a time lag of nearly nine months for depositions from the hosts of professional witnesses involved.

It was finally on November 10, 1980 that a Pre-Trial Conference Order was issued and trial set to begin in January, 1981.

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[24] 66 American Bar Association Journal 50.

D. CONTESTED ISSUES

The Pre-Trial Conference recognized that the United States, essentially realigned as Plaintiff, was asserting water rights for the Wind River Indian Reservation. The Tribes, similarly realigned as Plaintiffs, joined in that claim, but sought a larger quantification than the United States. The Tribes also asserted a reserved right for lands held in fee by Tribal members and their descendants, and for land that had been reacquired, and may be reacquired by the Tribes. The Tribes also sought an open-ended decree to provide for the unforeseeable future needs and for land not now "irrigably feasible", but which may become "feasibly irrigable" in future times.[25] The State of Wyoming, essentially realigned now as a Defendant, and some of the Defendants other than the United States and the Tribes, contests these claims on both factual and legal bases as set forth in their respective Pre-Trial Statements. The only uncontroverted fact going into the trial was in the stipulation on the exterior boundaries of the Wind River Reservation.

Contested issues of fact included:

(1) The purposes for which lands comprising the Wind River Indian Reservation were withdrawn;

(2) Did Congress intend to reserve water rights on behalf of the Wind River Indian Reservation, and if so, for what purposes; [26]

(3) The number of practicably irrigable acres on the Wind River Reservation; [27] and

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[25] Slater, Opening Remarks, Tr. p. 47, January 1, 1981.

[26] Issues (1) and (2) are determined in the section of this Report entitled "Intent and Purposes," infra.

[27] Issue (3) is determined in the sections entitled "The Determination of Practicably Irrigable Acres on the Reservation Historic Lands" and "The Determination of Practicably Irrigable Acres on the Reservation Future Lands".

(4) The injury to any State awarded water rights resulting from the exercise of federal reserved rights, if the Master finds any such reserved rights to exist.[28]

The contested issues of law included:

(1) Whether the United States, in the creation of the Wind River Indian Reservation, reserved water rights for the benefit of the Tribes;

(2) If reserved water rights were created in Wyoming, whether the reserved rights doctrine delineates the strict boundaries of those rights;

(3) What is the proper measure of those reserved water rights;

(4) Whether the Equal Footing Doctrine dictates that by admitting Wyoming into the Union on equal footing with the original thirteen states, the United States did not intend to reserve any water in the State of Wyoming;

(5) Whether the United States is estopped from claiming reserved water rights in Water Division No. 3;

(6) Whether the water rights must be quantified once and for all or whether the decree shall left open-ended;

(7) Should the amount to be reserved, if any, be that which is absolutely necessary to prevent the purposes of the Reservation being entirely defeated; or

(a) an amount necessary to fulfill the agrarian purposes only for which the Reservation was created; or

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[28] This question is addressed in the section entitled "Effect on State Water Rights."

(b) the amount of water sufficient to irrigate all practicably irrigable acres on the Reservation and for related domestic and stock watering uses only; or

(c) whether reserved water rights arise only in connection with the federal reservation of land and may be used only within the boundaries of the land with which it is associated;

(8) What is the quantity of reserved rights that may have been created and whether said quantity, once established, may be used for other purposes; and if so, can a restraint be placed on said other purposes so that the burden of loss of return flow is not placed on subsequent water users;

(9) What are the priority dates of any reserved water rights which may be found to exist;

(10) What is the priority date on land ceded but later restored to the Tribes; land sold to non-Indians but later re-acquired by or restored to the Tribes; and land sold to non-Indians and still in the ownership of non-Indians;

(11) Whether the Tribes reserved water rights include water for lands held in fee by Tribal members or direct descendants of Tribal members;

(12) Whether the Tribes' reserved water rights include water for land currently owned in fee by non-Indians which the Tribes expect to reacquire in the future;

(13) Are there geographical limits on the use of any reserved water that might be found to exist;

(14) Whether a reserved water right is terminated when it is leased, permitted, licensed or otherwise disposed of to a non-Federal entity or used for achievement of goals separate from those for which

the Reservation was originally created and the right originally reserved;

(15) Whether reserved rights apply to groundwater; and

(16) The proper standards and appropriate date, not before 1905, to be used in determining practicability of irrigation.

The treatment of boundaries and dates set forth in the Pre-Trial Order will be dealt with separately in this Report under the title, "Boundaries and Dates", which is next.

III. BOUNDARIES AND DATES

At the outset, it is important to bear in mind the role which the boundary determinations play in this case. This is a water rights case, not a land case. The acreage of the Wind River Indian Reservation is an issue because practicably irrigable acreage is made the measure of the Reservation's water rights. In *Winters v. United States, supra,* the Court established that the United States, when it creates an Indian reservation, impliedly reserves water for needs of the reservation, and that water rights established subsequent to those of the reservation give way to those of the reservation as its needs expand. The Court applied the *Winters* doctrine in its original opinion in *Arizona v. California, supra,* holding that at the time it created the five Reservations at issue there, the United States reserved enough water "to satisfy the future as well as the present needs of the Indian Rservations." 373 U.S. at 600. The Court concluded, agreeing with the Master, "that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage." *Id.* at 601. The Masters' choice of irrigable acreage as a measure was based on the conclusion that it provided an estimate of the amount eventually needed to make the otherwise arid lands productive. The Indians' actual use of the water

remains unrestricted. Practicably irrigable acreage, then, is a rough measuring stick, a tool toward an informed equitable estimate of the Indians' needs, both present and future. To use this measuring device, in turn, it is necessary to know the extent of the Reservation, and to measure the latter, the boundaries. The boundaries are a reference point for an issue itself secondary to the central concern of this case, water rights.[29]

The claims for water by the Shoshone and Arapahoe Indian Tribes are based on the Treaty of 1868 between the government of the United States and the Eastern Band of the Shoshones and the Bannacks. The Treaty, which was executed on July 3, 1868 at Ft. Bridger, conveyed to the Tribes that land:

> (C)ommencing at the mouth of Owl creek and running due south to the crest of the divide between the Sweetwater and Popo-Agie (sic) Rivers; thence along the crest of said divide and the summit of Wind River mountains to the longitude of North Fork of Wind River; thence due north to mouth of said North Fork and up its channel to a point twenty miles above its mouth; thence in a straight line to headwaters of Owl creek and along middle of channel of Owl creek to place of beginning, . . ." [30]

Pursuant to the *Winters* Doctrine, when the United States sets aside a reservation of land for the Indian Tribes, the government impliedly reserves a quantity of then unappropriated water sufficient to fulfill the purposes for which the government created that reservation. The *Winters* Doctrine also requires that for purposes of

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[29] The above is a literal paraphrase of the language used by Special Master Elbert P. Tuttle, in his Report in the "second" *Arizona v. California* case, No. 8 Original, S.C. Oct. Term, 1981, p. 64. It is most appropriately reproduced here.

[30] Treaty of 1868: Plaintiff's exhibit WRIR I & P 1, United States Exhibit WR-1.

establishing a priority date, water reserved in this manner receives the date of the creation of the reservation. The arrival at such a simple conclusion is not possible in this case, however, as a result of conveyances made of lands within the 1868 reservation subsequent to the date of the Treaty.

A. THE "LANDER" PURCHASE

The first such conveyance was the result of an agreement between the Shoshone Indians and the United States called the Brunot Agreement, named for Felix R. Brunot, the chief negotiator for the United States. The Brunot Agreement was executed on September 26, 1872 and ratified on December 15, 1874. The Agreement provided for a cession from the Shoshone Tribe to the U.S. of:

> (T)hat portion of their reservation in Wyoming Territory which is situated south of a line beginning at a point on the eastern boundary of the Shoshone and Bannack reservation, due east to the mouth of the Little Popo-Agie, at its junction with the Popo-Agie, and running from said point west to the mouth of the Little Popo-Agie; thence up the Popo-Agie to the North Fork, and up the North Fork to the mouth of the canyon, thence west to the western boundary of the reservation.

The lands involved in this cession, commonly referred to as the "Lander" Purchase, ceased to be administered as Reservation lands after the ratification date in 1874. The form of the transaction is, I believe, for purposes of this Report, noteworthy. In exchange for the Tribe's agreement to transfer ownership of the above-described lands to the United States Government, the U.S. in turn agreed to pay to the Shoshone Tribe a monetary compensation for the transfer. Once the lands were conveyed and the consideration tendered, neither party had any continuing obligation whatsoever with respect to the other as to the ceded lands.

B. THE "THERMOPOLIS" PURCHASE

The next significant transaction involving the Wind River Indian Reservation was the result of an agreement negotiated by James McLaughlin on behalf of the United States with the Shoshone and Arapahoe Tribes. The agreement is referred to alternatively as the "First McLaughlin Agreement" and the "Thermopolis" Purchase. For the Indians' part, the Shoshone and Arapahoes agreed to:

> *(C)ede, convey, transfer, relinquish, and surrender forever and absolutely all their right, title and interest of every kind and character in and to the lands and the water rights appertaining thereunto* embraced in the following described tract of country, embracing the Big Horn Hot Springs in the State of Wyoming: All that portion of the Shoshone Reservation described as follows, to-wit: Beginning at the northeastern corner of the said reservation, where Owl Creek empties into the Big Horn River; thence south ten miles, following the eastern boundary of the reservation; thence due west ten miles; thence due north to the middle of the channel of Owl Creek, which forms a portion of the northern bounary of the reservation; thence following the middle of the channel of said Owl Creek to the point of beginning. (Emphasis added.)

The transaction involved approximately 55,000 acres of the Reservation. In consideration of the transfer, the United States agreed to pay to the Tribes the amount of $60,000.00, which amount was to be expended "for the benefit of the said Indians" under conditions set forth in the Agreement. As with the Brunot Agreement of 1872, nothing in the First McLaughlin Agreement placed either party in a position of continuing responsibility or obligation to the other. The transaction was a simple conveyance and purchase transaction, wherein, for payment, the purchaser received full title to the subject lands.

C. THE 1905 ACT

The major controversy with regard to this element of the adjudication centers around the Second McLaughlin Agreement, which is more commonly referred to as the 1905 Act. It is the language of conveyance contained in the Agreement which is at the heart of the controversy with regard to the effect of this transaction. The State of Wyoming contends that the language and the transaction created a disestablishment of certain lands from the body of the 1868 Reservation in such a manner as to preclude the granting of an 1868 priority date for water on those lands which were ceded under the terms of the Agreement. On the other hand, the United States and the Tribes assert that I must look at the Agreement in its entirety and the circumstances surrounding the transaction in order to make a proper determination of the legal consequences of the conveyance. The U.S. and the Tribes, in that context, argue that the Agreement simply provided a type of "power of attorney" whereunder the United States accepted the ceded lands and held those lands in trust for the Indians for resale to other persons, and that the United States maintained a continuing obligation to the Indians with regard to that land. Having given this issue much research and thought, it is my conclusion that the arguments of the United States and the Tribes find significantly greater support in the law than those asserted by the State of Wyoming.

It is true, as urged by the State, that the language of conveyance in the 1905 Agreement is extremely broad. Article I of the Agreement sets forth the conveyance in the following terms:

> ARTICLE I. The said Indians belonging on the Shoshone or Wind River Reservation, Wyoming, for the consideration hereinafter named, do hereby *cede, grant, and relinquish to the United States, all right, title, and interest* which they may have to all the lands embraced within the said reservation, except

> the lands within and bounded by the following described lines: Beginning in the midchannel of the Big Wind River at a point where said stream crosses the western boundary of the said reservation; thence in a southeasterly direction following the midchannel of the Big Wind River to its conjunction with the Little Wind or Big Popo-Agie River, near the northeast corner of township one south, range four east; thence up the mid-channel of the said Big Popo-Agie River in a southwesterly direction to the mouth of the North Fork of the said Big Popo-Agie River; thence up the mid-channel of said North Fork of the Big Popo-Agie River to its intersection with the southern boundary of the said Reservation, near the southwest corner of section twenty-one; township two south, range one west; thence due west along the said southern boundary of the said reservation to the southwest corner of the same; thence north along the western boundary of said Reservation to the place of beginning: . . . (Emphasis added.)

This act involved approximately 1,480,000 acres of Reservation land—nearly 65% of what remained after the two earlier cessions—and directed that those lands be disposed of pursuant to Article II of the Agreement. That Article provided that the United States would dispose of the land under a payment schedule set forth therein, and "to pay the said Indians the proceeds derived from the sales of said lands . . . the amounts so realized to be paid to and expended for said Indians in the manner hereinafter provided."

Although Congressman Frank Mondell of Wyoming, who sponsored the 1905 Act, had forecast proceeds from the sale of the ceded lands to total more than 1.8 million dollars, little more than a quarter of a million had been realized on the sale of just 128,986.56 acres as late as June 12, 1914. In 1915 the Secretary of the Interior temporarily postponed further sale of the ceded lands,

and during the period from 1915 through 1934 only a few transactions, involving a minimal number of acres of land within the area, were sold. On September 13, 1934, the Interior Department again temporarily withdrew from further disposition the remaining land ceded under the terms of the 1905 Act. Subsequently, under the terms of restoration orders approved by the Congress, all of the remaining lands ceded by the 1905 Act, but not disposed of under its terms, were restored to the Reservation.

Attorneys for the State of Wyoming contend that this transaction constituted a "disestablishment" of those lands ceded under the 1905 Act and that the disestablishment resulted in a severance of the 1868 priority date from the ceded lands.

I think not. The Tribes were not advised that the effect of the Agreement would be the destruction of any water rights flowing from the 1868 Treaty. Nor was it the intention of either the Tribes or of the negotiators for the United States that the Agreement have the effect of destroying existing water rights, unless title passed to a *bona fide* purchaser or valid homesteader according to law. It is basic Indian property law in this country that the extinguishment of Indian property rights must be clearly and plainly provided for by the Congress and will never be implied. *Menominee Tribe v. United States*, 391 U.S. 404, 412-13 (1968); *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 353-55 (1941).

Further, "when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." *U.S. v. Celestine*, 215 U.S. 285, 54 L.Ed. 195 (1909). And the law is clear that such a Congressional determination "must be expressed on the face of the act or be clear from the surrounding circumstances and legislative history." *Mattz v. Arnett*, 412 U.S. 481, 505, 37 L.Ed. 2d 92, 93 S.Ct. 2245 (1973). When read it its entirety, and

when considered in light of the circumstances surrounding the transaction, the 1905 Act seems more clearly to support the contention of the Tribes and the United States that the intent was that the Indians convey to the United States only the right to dispose of the ceded lands, i.e., to act as an agent with the power of attorney necessary to pass perfect title to a purchaser. I believe that Article III, IX and X provide sufficient support for this conclusion.

The final sentence of Article III reads, in pertinent part, as follows:

> (T)hat upon the completion of the said fifty dollars per capita payment, any balance remaining in the said fund of eighty-five thousand dollars, shall at once become available and shall be devoted to surveying, platting, making of maps, payment of the fees, and the performanc of such acts as are required by the statutes of the State of Wyoming in securing water rights from said State for the irrigation *of such lands as shall remain the property of said Indians, whether located within the territory intended to be ceded by this agreement or within the diminished reserve.* (Emphasis added.)

This language clearly demonstrates the intent of the parties to the Agreement that certain of the lands within the ceded portion, excepting those lands disposed of by the United States on behalf of the Tribes under the provisions of the Agreement, would remain the property of the Indians.

Additionally significant is Article IX of the Act, which spells out the residual obligations of the United States under the Agreement and concludes:

> It is understood that nothing in this agreement contained shall in any manner bind the United States to purchase any portion of the land herein described, except Sections sixteen and thirty-six or the equiva-

> lent in each township or to dispose of said lands except as provided herein, or to guarantee to find purchasers for said land or any portion thereof, *it being the understanding that the United States shall act as trustee for said Indians to dispose of said lands and to expend for said Indians and pay over to them the proceeds received from the sale thereof only as received, as herein provided.* (Emphasis added.)

It is clear that the intent of the Brunot Agreement (The Lander Purchase) and the First McLaughlin Agreement (The Thermopolis Purchase) was to effect a disestablishment and a complete severance of the subject lands from the Reservation and Indian ownership. And the aforementioned language of the 1905 Act just as clearly indicates that the intent of this Act was to establish a trust relationship, with the United States acting as the trustee for the sale of certain Indian lands to settlers. The language of the 1905 Act is similar to that of the Agreement at controversy in *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920), wherein the U.S. Supreme Court found the existence of just such a trust relationship.

In *Ash Sheep*, the defendant company was indicted for violating a statute which prohibited the driving of cattle "to range and feed on any land belonging to any Indian or Indian Tribe." The lands upon which the cattle had been driven were within the Crow Indian Reservation and subject to the Act of April 27, 1904, which had ratified and amended an agreement with the Crow Tribe. The United States agreed, under the terms of this Act, just as it did with the Shoshones and Arapahoes in 1905, that it would dispose of the effected lands by permitting them to be entered upon by homesteaders and other settlers, and that it would act as trustee in collecting the proceeds realized by such entry for the Indians and applying them as provided by the Agreement.

The Company, relying on the words of the Crow agreement, under which the Indians were said to "hereby cede, grant and relinquish to the United States all right, title and interest" in the lands to be open to settlement, insisted that the Indian title to those lands was extinguished and the lands upon which the Company grazed its stock were public, not Indian lands. The Company argued:

> (A)ll of the Indian rights were extinguished. . . . The cession to the United States is unqualified and unconditional. The manner of the disposal of the land, practically, under all of the land laws of the United States, . . . would preclude the idea that the Indian Department should exercise jurisdiction over it. 252 U.S. 159, at 160.

The arguments made by Ash Sheep Co. in this case were remarkably similar to those offered by the State of Wyoming here and, just as the Supreme Court rejected them in that case, so do I in the one at bar. In the former, the Supreme Court stated:

> It is obvious that the relation thus established by the act between the Government and the Tribe of Indians was essentially that of trustee and beneficiary and that the agreement contained many features appropriate to a trust agreement to sell lands and devote the proceeds to the interests of the *cestui que trust.*
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> • • • •
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> Taking all of the provisions of the agreement together we cannot doubt that while the Indians by the Agreement release their possessory right to the Government, the owner of the fee, so that, as their trustee, it could make perfect title to purchasers, nevertheless, until sales should be made any benefits which might be derived from the use of the lands would belong to the beneficiaries and not to

> the trustee, and that they did not become 'Public lands' in the sense of being subject to sale, or other disposition, under the general lands laws. . . . They were subject to sale by the Government, to be sure, but in the manner and for the purposes provided for in the special agreement with the Indians, which was embodied in the Act of April 27, 1904. . . . 252 U.S. 159, at 166

The State of Wyoming responds to these arguments with the suggestion that the manner of administration of such lands is irrelevant. She argues that even though the ceded lands have remained property of the Tribes, they have been, nonetheless, disestablished from the 1868 Reservation and that as a result of this disestablishment the 1868 priority date has disapepared in the context of the ceded portion. During closing arguments on the issue the State of Wyoming said:

> The Tribes and the United States seemed to argue that because the Indians or the Tribes through the United States maintain some interest in the ceded lands, that means the boundaries of the Indian Reservation still encompasse those ceded lands.
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> (Transcripts of September 8, 1980, p. 50)

Conversely, the State of Wyoming seems to argue that even though lands which were ceded under the 1905 Agreement but never disposed of thereunder remained the property of the Indians, the fact that the Act provided for their cession and subjected them to disposition effected a severance of certain of the Indian rights on said lands, specifically their right to an 1868 priority date for water on those lands. I find no legal justification for this conclusion. Certainly the State has cited no case law to support this argument. There is in evidence copies of maps produced both by the State of Wyoming and the United States which show the Reservation in its so-called diminished form, i.e. consisting only of those lands not ceded under the terms of the 1905 Agree-

ment. Those maps are of little assistance in determining the effect of the 1905 Act on the lawfully recognized boundaries of the Reservation. They certainly indicate the perceptions of mapmakers as to those boundaries, and these maps form but a small portion of the many items of evidence and law considered in determining this issue. The State does rely, to some extent, on the opinion of the U.S. Supreme Court in *Rosebud Sioux Tribe v. Kniep*, 430 U.S. 584, 51 L.Ed. 2d 660, 97 S.Ct. 1361 (1977). However, at the outset of that opinion, Justice Rehnquist sets forth the following generally applicable rules of law in this area:

> In determining whether or not the 1889 Reservation boundaries were subsequently diminished by Congressional enactments, we are guided by well-established legal principles. The underlying premise is that congressional intent will control. *DeCoteau v. District County Court, supra*, 420 U.S. 425, at 444, 449, 43 L.Ed. 2d 300, 95 S.Ct. 1082; *United States v. Celestine*, 215 U.S. 278, 285, 54 L.Ed. 195, 30 S.Ct. 93 (1909); see also, *Mattz v. Arnett, supra*, 412 U.S. 481 at 505, 37 L.Ed. 2d 92, 93 S.Ct. 2245 (1973). *The mere fact that a reservation has been open to settlement does not necessarily mean that the opened area has lost its reservation status. Mattz v. Arnett, supra*; see also *Seymour v. Superintendent*, 368 U.S. 351, 7 L.Ed. 2d 346, 82 S.Ct. 424 (1962). But the 'general rule' does not command a determination that reservation status survives in the face of congressionally manifested intent to the contrary. *DeCoteau v. District County Court, supra.* In all cases, 'the fact of the Act,' the 'surrounding circumstances,' and the 'legislative history,' are to be examined with an eye toward determining what congressional intent was. *Mattz v. Arnett, supra*, at 505, 37 L.Ed. 2d 92, 93 S.Ct. 2245. 51 L.Ed.2d 660, at 664-65. (Emphasis added.)

In applying these niceties of law to the facts in *Rosebud*, the Supreme Court concluded that "the acts of 1904, 1907 and 1910 did clearly evidence Congressional intent to diminish the boundaries of the Rosebud Sioux Reservation." However, this case—and its 1905 Act—differ substantially from the facts and circumstances involved in Rosebud. For example, in *Rosebud* the key word "convey" is used. It is absent in the "cede, grant and relinquish" language in the 1905 Act. I feel that *Rosebud* should not control the decision here.

To further support its position, the State of Wyoming cites *State v. Moss*, 471 P.2d 333 (1970); and *Blackburn v. State*, 357 P.2d 175 (1960), for the proposition that the Wyoming Supreme Court has recognized the disestablishment of the opened lands. But neither case is applicable to the question of priority dates on the undisposed lands. In *Moss* the trial court dismissed a first degree murder charge against the defendant for lack of jurisdiction, finding the crime was committed on "Indian country" and, therefore, the United States had exclusive jurisdiction. However, the Wyoming Supreme Court reversed on the basis that the situs of the crime was ceded land transferred from Indian ownership. The land in question was allotment land which had been sold to a non-Indian and was, thusly, no longer a part of the Reservation.

The decision in *Blackburn* dealt with equally dissimilar lands. The situs of the crime was land whose Indian ownership was terminated by the Act of August 15, 1953, which Act compensated the Tribes for certain lands within the Riverton Reclamation Project. The State Supreme Court adopted this conclusion of the trial court:

> When the Indian title to these lands was fully and finally extinguished by the Act of August 15, 1953 aforesaid, jurisdiction, civil and criminal, over these lands passed from the United States to the State of

> Wyoming in all particulars, the same as any other lands within the public domain of the State of Wyoming. *Blackburn, supra*, at 178.

It seems to me that the conclusion the State asks is not only insupportable by law and by the circumstances of this case, but it would be a result on the short side of equity, and would fly in the face of Article X of the 1905 Agreement, which reads as follows:

> It is further understood that nothing in this agreement shall be construed to deprive the said Indians of the Shoshone or Wind River Reservation, Wyoming, of any benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement.

Under the *Winters* Doctrine, the Tribes are entitled to a priority date of 1868 for those lands reserved to them by the government. Nothing in the 1905 Agreement, nor the circumstances surrounding it, would lead one to conclude that the Indians or the U.S. intended that the water rights associated with the opened or ceded lands disappear as of the date of the Agreement. Certainly a retention of the 1868 priority date is a right to which the Indians were entitled under an existing treaty, and is a right which is not inconsistent with the provisions of the 1905 Agreement. I so find.

D. PRIORITY AND ALIENATION

The Boundaries and Dates foundation matter decided, there remains three issues, each of far-reaching importance to parties in this adjudication. They are:

Question 1: Upon the conveyance in fee of a parcel of land from an Indian allottee to a non-Indian, did a reserved water right pass to the non-Indian grantee? Or did it revert to the Tribes? Or was it lost by alienation?

Question 2: If the parcel is subsequently reacquired by the Tribes, what date governs for the establishment of a reserved right, the treaty date or the date of reacquisition?

Question 3: If the parcel is still in the ownership of non-Indians as of this adjudication, do they enjoy a reserved water right upon it by virtue of the conveyance from an Indian to their predecessors in title?

Before addressing each question, it is necessary to recognize that the ultimate answer to No. 3 may have to await further proceedings. This Report addresses Indian claims alone, and technically all parties whose rights are at stake in resolving Question No. 3 have not been heard from.[31]

1. The Initial Conveyance

In determining Question No. 1—Alienability—the following cases were read and studied: The two *Colville* cases; the original opinion of the late Marshall Neill (C.J. 9th CAA), 460 F.Supp. 1320 (1978); the 9th Circuit opinion at 647 F.2d 42 (1981) which reversed the Neill opinion above; *United States v. Powers*, 316 U.S. 527 (1939); *United States v. Anderson*, supra.; *United States v. Hibner*, 27 F.2d 909 (1928); *United States v. Adair*, supra.; *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (1956).

None of the above was held to be determinative. Instead I re-read the briefs and proposed findings of all

[31] Mr. Sky D. Phifer, counsel to a group who assert a right stemming from Indian predecessors in title, has reserved time for a hearing concurrent with the preparation of this Report. On the other hand, a day of hearing (Tr. 156-157, pp. 14411, et seq.) was utilized by James Barrett and Michael Messenger, attorneys for the Merrill-Duncan-Webber group of defendants, whose rights, including determination of the status of the *Hempleman* decree, will be determined in a Supplemental Report to be issued following hearings on all remaining matters—Forest, BLM, parks, and other matters not involving the Wind River Indian Reservation.

parties who submitted material on alienability. Much in these pleadings deals with interpretations of the two *Colville* decisions.[32]

I believe that Question No. 1 is properly answered by holding that the reserved right existing at the time of conveyance gives a non-Indian grantee no reserved right to water. The record in this case is replete with examples where land so conveyed was immediately listed in the jurisdiction of the Wyoming State Engineer with state water permits being issued thereon; and therefore became subject to Wyoming state water law. To completely answer Question No. 1, it is also inescapable to me that conveyance of an allotment parcel within the boundaries of the Reservation, and later reacquired by the Tribes, does not destroy the right for that land to be included in acreage determining reserved right quantities in a general stream adjudication of this kind and at this time. I believe the cut-off on this ruling to be the adjudication itself. It would be an injustice to extend this right to lands that may be reacquired by the Tribes following the date of the Report herein. The purpose of this decree is to make a *final* determination of the quantification of water rights on the Reservation, not to set in motion

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[32] The positions of the parties in *Colville* were similar to the instant case, but facts were massively different. Walton and the state argued that since *Winters* rights are appurtenant to the Indian allotment, the rights are transferred at the time of the conveyance of the allotment to a non-Indian. (Thus directly contrary to Wyoming law as adjudged in *Merrill v. Bishop*, supra.) The Confederated Tribes, on the other side, contend that *Winters* rights are Tribal rights and that Congress in the Allotment Act did not intend to divest Tribes of these rights; ergo, an allottee may only hold his proportionate share of the Tribal rights while holding the land, and may not alienate these water rights when he sells his land to a non-Indian. The United States asserts that the allottee may sell to a non-Indian a right to that portion of water which was being put to beneficial use at the time the allotment left trust status and that this transferrable water right would have a priority date as of the establishment of the Reservation.

machinery that could extend the uncertainties for another century.

The United States and Tribes oppose the latter part of this finding on Question No. 1, and argue that reserved rights continue to be available for fee lands as they are reacquired in trust for the Tribes.

The Tribes assert the following in support of its contention:

> While the lands are out of trust status in non-Indian ownership the level of Indian development on the reservation trust lands is necessarily lower. But the status of land titles on Indian reservations is dynamic; shifting congressional policies for example have made varying portions of Indian reservations available to non-Indians. Today the policy of the United States is to consolidate reservation land in trust for the benefit of Indians. F. Cohen, Handbook of Federal Indian Law (1982 ed.), pp. 612-15. *The accident of time in which a stream adjudication occurs should not cause the court to overlook the fact that the reservation's title status is continuously evolving. Thus, the wisest position for the court* to adopt *regarding* reserved rights is that so long as there is a reservation, there are reserved rights with a priority date as of the creation of the reservation. United States Brief in Support, p. 277. As the United States requested in its April 7 Brief, the decree *in this case can be modified if necessary to accommodate,* at a later date, the reserved rights *associated with fee lands as they are reacquired in trust for the Tribes.* (Emphasis added by Tribes)

I disagree with the above. For if it is acceptable, then mainstream adjudications or other hearings under the McCarren Amendment would become a nullity. The very purpose of this long and costly trial is to put an end to the uncertainty that exists for both Indians and non-

Indians in Water Division No. 3. This cannot be achieved if there is to be a residual right in the Tribes to acquire long standing non-Indian inholdings, return them to Tribal status, and announce with a flourish an imposition of a 1868 date for water on such lands. I believe the following example proves my point.

Let us assume the Tribes purchase every acre of every ranch and farm now constituting the Riverton Reclamation Project. These are lands of the Reservation's "ceded" portion, thrown open to settlement in 1905 and in the main farmed continuously ever since. These lands operate under state awarded Permit 7300, with a 1905 priority date. Are we to assume that should they suddenly be owned by the Tribes, these 1905 water rights are no longer capable of providing a livelihood for Indians, even though they have for non-Indians these past 75 years? How can it be asserted that, "the purposes for which the Reservation was created" are not properly fulfilled by the acquisition of a 1905 reserved right stemming from long ceded lands with a 1905 state right which has sustained generations of farmers and ranchers in the area?

My argument is not to be interpreted as desiring to impose these state water rights upon the Tribes in the event of such an acquisition. Its point is to prove that a 1905 reserved water right date would be in order and fair, rather than a treaty date, which would be unequal and unfair, in the event of future acquisitions of this kind.

2. Reacquisition By Tribes

Question No. 2 is next answered. For reasons stated above, the treaty date of 1868 is hereby awarded to lands within original Reservation boundaries reacquired by the Tribes prior to the date of this Report. Following the date of this Report, the date to establish the reserved right is the date of the issuance of the first state awarded

water permit on said after-acquired land, if uncancelled at the time of reacquisition.

This report is careful not to impose state water rights upon said parcels, and to adhere to Wyoming's Constitutional disclaimer of jurisdiction over said Indian lands. The measure of these efforts is to establish dates for reserved rights, not to impose state water rights or their statutory conditions upon Indians or their land.

3. Reacquisition By Non-Indian Entity

Question No. 3 will now be addressed subject to the Supplemental Report herein, for reasons mentioned above.

I hold that the conveyance of Reservation land to a non-Indian in fee does not include a treaty-date reserved water right for that specific land. For if it did, then it is proper to decree that non-Indians now in ownership of lands granted by Indians to predecessors in title should also retain the coveted 1868 date; and with this I cannot agree. To do so would be to undo long-settled Wyoming law on this point;[33] something that is not warranted by the evidence in this adjudication.

Cappaert aside, no showing has been made that the implied reserved right for water was ever intended to benefit any but Indians. The conclusion on Congressional intent (see, "Intents and Purposes", *infra*) supports the view that the Treaty of 1868 was to reserve a number of acres of land for the Tribes that would continue without marked change in status or area, as so often stated, for their permanent home. In this regard, *Colville*[34] reveals this excellent statement of judicial logic which was promptly reversed by the 9th Circuit Court:

> An analysis of the rationale for the reserved rights doctrine convinces this Court that the implied reser-

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[33] See *Merrill v. Bishop*, 74 Wyo. 298 (1955).

[34] *Colville*, 460 F.Supp., p. 1328.

vation of waters on Indian reservations should be limited to Indian ownership. *Winters* doctrine rights were reserved to members of the Indian tribe living on the reservation. *Winters, supra*, 207 U.S. at 576, 28 S.Ct. 207; *Arizona v. California*, 373 U.S. at 600, 83 S.Ct. 1468. Water was impliedly reserved to ensure that the lands intended to be permanent homelands for the Indians would have the necessary water to fulfill that purposes. *Id.* The Indians of the Northwest were not agrarian at the time they were forced onto reservations. The transition from the traditional nomadic life to an agrarian existence required the development of agricultural skills. Implied reserved water rights are open-ended so that as the Indians develop the necessary skills they are able to appropriate the water required to make the land productive. See *Winters*, supra. When title to Indian lands passes into non-Indian hands, the purposes for which the reserved water rights are implied no longer exist. It therefore seems logical to conclude that reserved water rights on Indian reservations are limited to Indians.

The purpose of the reservation is to be determined from the intent of the creators at the time of the withdrawal from the public domain. *Id.* The reservation of water may be implied only where such water is essential to preserve the purpose for which the reservation was created. No reservation of water may be implied for any use which is not based on one of the purposes for which that land was reserved. [*United States v. New Mexico*, 98 S.Ct. 3012, 57 L.Ed.2d 1052 (1978).] Applying these recent restricted concepts of reserved rights, it is clear that when the reserved purposes are terminated, as when a national park is returned to the public domain or when Indian property is sold to non-Indians, the reserved rights can no longer be judicially implied.

> This Court therefore concludes that *Winters* reserved rights do not per se apply to allotments owned by non-Indians. This conclusion, however, does not foreclose possible availability of water to the non-Indian grantee.

In contrast, the following language from the *Colville* reversal may give hope to all defendants who own lands once conveyed by an Indian allottee. I have rejected this rationale because the evidence in this case is replete with examples of state water permits either being requested or granted immediately upon acquisition of these parcels by non-Indian owners. They did not look to the Indian grantor for water. I believe this distinguishes the *Colville* facts from the case at bar.

> It is settled that Indian allottees have a right to use reserved water. *United States v. Powers*, 305 U.S. 527, 59 S.Ct. 344, 83 L.Ed. 330 (1939). '[W]hen allotments were made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners.' *Id.* at 532, 59 S.Ct. at 346. We must determine whether non-Indian purchasers of allotted lands also obtain a right to some portion of reserved waters.
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> The general rule is that termination or diminution of Indian rights requires express legislation or a clear inference of Congressional intent gleaned from the surrounding circumstances and legislative history.
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> See *Bryan v. Itasca County*, 426 U.S. 373, 392-93, 96 S.Ct. 2102, 2112-13, 48 L.Ed.2d 710 (1975); *Mattz v. Arnett*, 412 U.S. 481, 504-05, 93 S.Ct. 2245, 2257-58, 37 L.Ed.2d 92 (1972). Upon careful consideration, we conclude this principle supports the proposition that an Indian allottee may sell his right to reserved water.

> The district court's holding that an Indian allottee may convey only a right to the water he or she has actually appropriated with a priority date of actual appropriation reduces the value of the allottee's right to reserved water. We think this type of restriction on transferability is a 'diminution of Indian rights' that must be supported by a clear inference of Congressional intent.
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> By placing allotted lands in trust for 25 years, Congress evinced an intent to protect Indians by preventing transfer of those lands. But there is no basis for an inference that some restrictions survived beyond the trust period. Congress provided for extensions of the trust period, but directed that fee title be conveyed to the allottee when the period expired. We think the fee included the appurtenant right to share in reserved waters, and see no basis to share in reserved waters, and see no basis for limiting the transferability of that right.
>
> This conclusion is supported by our decision in *United States v. Ahtanum Irrigation District*, 236 F.2d 321, 342 (9th Cir. 1956), *cert. denied*, 352 U.S. 988, 77 S.Ct. 386, 1 L.Ed.2d 367 (1957). *Ahtanum* held that non-Indian purchasers of allotted lands are entitled to 'participate ratably' with Indian allottees in the use of reserved water. *Colville*, *supra*, 42 at 50.

In this adjudication, there are many distinctions readily apparent from the facts of *Colville*. In that case, only one river was involved, the No Name, and it was located "entirely within the Reservation." The appellate court noted that the state's interest in extending its water law to the reservation was limited; that tribal or federal control of No Name waters should have no impact on state water rights off the Reservation.[35]

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[35] See *Colville*, *supra*, p. 2639.

In this adjudication, an entire river system, not just one stream, is involved. It is not entirely within Indian country, but headwaters near, and passes through the Reservation and continues to be the source of water for thousands of defendants living downstream in Water Division No. 3. Wyoming is not seeking to impose or extend its water law to the Reservation, but is maintaining certain positions regarding the selection of a reserved right date, and what qualifies as land deserving it.

And lastly, rather than having no impact of state water rights off the Reservation, in this case quantification of reserved rights will adversely affect virtually all of the balance of state awarded rights in the entire Division.

The above are some of the reasons I declined to follow the latter *Colville* holding. It is also worthy of note that few matters are as diffused as this subject in Western water law. The last footnote in the *Colville* Circuit Court of Appeals reversal implored the Supreme Court to pass upon and in finality reconcile these difficult and conflicting views: It read:

> We are persuaded of the correctness of our analysis and conclusion concerning the transferability of the water rights involved in this litigation. Nevertheless, we recognize that reasonable minds hold conflicting views. State and federal courts, state and federal agencies responsible in water rights administration, and the numerous Indian tribes, allottees and their transferees, are plagued almost on a daily basis with the problems and uncertanties surrounding the issues discussed in this opinion. This case presents an appropriate vehicle for the Supreme Court to give guidance and stability to an area of great unrest and uncertainty in Western water and

> land law. A definitive resolution is overdue. The magnitude of the problem cannot be overstated.[36]

Whereupon the Supreme Court promptly declined review.[37]

In conclusion, I find that July 3, 1868—the date of the treaty between the United States and the Tribes—is the priority date for reserved water rights on all practicably irrigable acres within either the diminished or ceded portion of the Wind River Indian Reservation. This treaty priority date will apply also to Indian fee or tribal lands within the aforesaid Reservation that were conveyed in fee to non-Indian ownership and reacquired, so long as said lands were reacquired by the Tribes prior to the date of this Report in this adjudication.

The 1868 treaty date will not apply to lands reacquired by the Tribes after the date of this Report, whether located in ceded or diminished portions of the Reservation, or anywhere else in Water Division No. 3. I find that this adjudication assists in fulfilling the purposes for which the Reservation was established, quantifies the water for its future generations, and terminates the need to assert a treaty date for water rights for any future acquisition of land by the Tribes of this Reservation.

The above treaty date will not apply in determining the water rights of non-Indian owners of parcels within or without the Reservation. This finding supports and sustains Wyoming law,[38] affirming that non-Indians who purchased lands from Indians did not receive superior water rights stemming from the treaty.

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[36] 647 F.2d 42 at 54.

[37] Cert. Denied. No. 81-421, 70 L.Ed. 630 (Feb. 12, 1982). Justice Brennan and Justice White would have granted certiorari.

[38] See *Merrill v. Bishop*, 74 Wyo. 298 (1955).

Those Reservation lands conveyed under the terms of the Brunot Agreement and the First McLaughlin Agreement were conveyed absolutely from Indian ownership, and as such are not entitled to priority date based on the doctrine of reserved rights.

These Findings and Conclusions are included in the section entitled "Findings of Fact and Conclusions of Law", *infra.*

IV. INTENT AND PURPOSES

A. INTENT

The primal issue in adjudicating the right of the Wind River Indian Reservation to a federal reserve of water is whether any right exists at all. This requires a finding and conclusion that Congress, either explicitly or impliedly, intended to reserve water when it created the Wind River Indian Reservation. The respective positions of counsel for the State of Wyoming and the United States are diametrically opposed on this issue.

Counsel for the State of Wyoming contends Congress did not explicitly reserve any water nor did it intend to do so. Furthermore, evidence of certain acts of Congress and federal officials is presented to show that Congress consciously elected to deny a reserved right and deemed it more appropriate for the Indians to get their water by application to the State Engineer. Counsel argues that *Winters* does not apply to this reservation and that the history of Wyoming and the development of the Wind River Indian Reservation is unique and justifies a conclusion contrary to the holding in *Winters.* Finally, the nature and extent of detriment to non-Indians in the Big Horn River System presented during the hearings is submitted as further proof of a conflict of Congressional positions designed to show that Congress certainly could not have intended to grant a reservation as envisioned by the pleadings of the United States.

Counsel for the United States relies on the *Winters* decision, and subsequent United States Supreme Court case law derived from that decision, to maintain that the doctrine of an implied intent to reserve water for a reservation applies to the Wind River Indian Reservation. The Treaty of 1868, interpreted in light of the *Winters* precedent and compared to the facts in that case, is offered as the determinative authority for the position of the United States.

I have studied the relevant United States Supreme Court case law and have carefully examined the 1868 Treaty and how the language and history of that Treaty relates to the development of the reserved rights doctrine. I have analyzed the 348 "Intent and Purposes" exhibits offered by the State of Wyoming, along with the competent argument of counsel for the State of October 7, 1981,[39] supporting the position that no reservation of water exists. It is my conclusion that the *Winters* doctrine is applicable and that Congress, by the Treaty of 1868, impliedly created a reservation for water on the Wind River Indian Reservation to satisfy the purposes of that Treaty.

1. Fort Belknap Reservation

The agreement of May 1, 1888,[40] which created the Fort Belknap Reservation, was the subject of the United States Supreme Court landmark holding known as the *Winters* Doctrine.[41] In that decision, the Court affirmed the lower court decree granting the Indians an implied reservation of water by virtue of the 1888 treaty which

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[39] Tr. p. 11285 *et seq.*

[40] 25 Stat. at L. 113, Chapter 213.

[41] *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908).

created the reservation. The Court has considered the implied reservation question several times since, and has affirmed its position each time.[42] Furthermore, lower courts have consistently applied the doctrine in a variety of circumstances as controlling precedent.[43]

The Wyoming Supreme Court has also considered the *Winters* Doctrine and its specific application to the Wind River Reservation.[44] That case concerned an action to enjoin State Engineer and other water officials from interferring with and closing the head gates of the plaintiffs, who owned land originally allotted to Indians. Justice Blume carefully developed his decision by applying the law only to the precise fact situation presented and specifically did not intend his opinion to be expansively interpreted:

> We shall not, however, in deciding this interesting and heretofore undecided question involved herein, go further than is necessary, and shall, as far as possible, leave undecided points on which the Supreme Court of the United States is the ultimate authority.[45]

He did, however, begin his analysis with the premise that *Winters* must be reckoned with.

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[42] *United States v. New Mexico*, 438 U.S. 696, 89 S.Ct. 3012, 57 L.Ed.2d 1052 (1978); *Capparet v. United States*, 426 U.S. 128, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976); *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963).

[43] *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir., 1981); *United States v. Adair*, 478 F.Supp. 336 (D. Ore. 1979); *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956); *Anderson v. Spear-Morgan*, 79 P.2d 667 (Mont. 1938); *United States v. Hibner*, 27 F.2d 409 (D. Ida. 1928); *Conrad Inv. Co. v. United States*, 161 F. 829 (9th Cir., 1908).

[44] *Merrill v. Bishop*, 287 P.2d 620 (Wyo. 1955).

[45] *Ibid.*, at p. 625.

> It must, of course, be admitted that according to the holding in *Winters v. United States, supra*, the water rights appurtenant to the Indian Reservation here in question were reserved to the Indians by the treaty of 1868.[46]

My conclusion on the question of Congressional intent does not disrupt the holding in *Merrill v. Bishop*. It answers a question presented by the referral which was not before the Wyoming Supreme Court in that case.

2. The Wind River Indian Reservation

The Treaty of 1868 between the Shoshone and Bannack Tribes and the United States, which created the Wind River Indian Reservation, is the crucial document in determining congressional intent.[47] Article II of the Treaty specifically provides that the reservation be ". . . set apart for the absolute and undisturbed use and occupation of the Shoshone Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing . . . to admit amongst them. . . ." Article IV provides that the Indians ". . . will make said reservations their permanent home . . ." and Article VI anticipates that they will ". . . desire to commence farming. . . ." I can find no significant difference between the intent of Congress exhibited by these passages and those passages from the Fort Belknap Treaty provisions ruled upon by the United States Supreme Court in *Winters*.[48] While it must be admitted that the respective treaty provisions are not identical, they are so similar that one may reasonably imply the same Congressional intent from each treaty. Any other conclusion would appear to be contrived, and contrary to Supreme Court precedent.

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[46] *Ibid.*, at p. 623.

[47] Plaintiff's Exhibit WRIR I & P 1; U.S. Exhibit WR-1.

[48] *Winters*, at p. 565.

The conclusion of implied Congressional intent is not refuted by the contention of the State of Wyoming that the Wyoming Act of Admission[49] is explicit proof of Congressional intent to the contrary. The State argues that Congress, in admitting Wyoming as a state in 1890, adopted and ratified the Constitution of Wyoming, including Article 8, Sections 1 and 3.[50] Those sections are as follows:

> 1. Water is state property.
>
> The water of all national streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state.
>
> 3. Priority of appropriation.
>
> Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests.

Consequently, the State contends, Congress explicitly acknowledged that all water in Wyoming is the property of Wyoming and therefore subject to appropriation only through the laws of Wyoming, and concludes that the ratification repeals any reservation of water created by the Treaty of 1868. The Supreme Court was presented with a similar argument in *Winters* and determined such an argument to be "elaborate and able" but without merit.[51] I believe the same conclusion is appropriate in this case.

I acknowledge and appreciate that the Constitutions of Wyoming and Montana are not identical in the sections relevant to this case nor are the fact situations

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[49] Plaintiff's Exhibit WRIR I & P 11.

[50] Plaintiff's Exhibit WRIR I & P 12.

[51] *Winters*, at p. 578.

surrounding the two reservations. However, the logic and analysis used by the Supreme Court in *Winters* applies equally well here. There is no direct, obvious provision in the Act of Admission which openly states that Congress is repealing any provision of the Treaty of 1868. To reach such a conclusion, one must *imply* that intent from the document. Such an implication would be ill-founded. Additionally, it is ironic that the argument of the State requires a rejection of an implied intent analysis when dealing with the Treaty of 1868 and yet requires the same implied intent analysis in considering the 1890 Act of Admission. Given the application of the *Winters* decision to the 1868 Treaty, I cannot see how one can reasonably conclude that an "elaborate", speculative interpretation of an act is sufficient to deprive the Indians of the water reserved to them by the Treaty of 1868, a reservation which, without water, "would be valueless".[52]

The remaining argument against a reservation of water is that there exists conflicting evidence on the Congressional intent question. Even if that were true, the *Winters* decision still requires a finding that intent existed. Mr. Justice McKenna recognized there may be a conflict of the implications which may be drawn from the various acts, but he concluded that when such a conflict exists, ". . . that which makes for the retention of the waters is of greater force than that which makes for their cession." [53]

Many of the exhibits introduced by the State of Wyoming during the "intents and purposes" portion of its case in chief were letters between certain officials, records of appropriation actions taken by Congress, and reports to Congress by various Indian agents. These documents were presented as proof of a conscious, deliberate

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[52] *Winters*, at p. 576.

[53] *Ibid.*

attitude of Congress that if the Indians were to expect any water, they must rely on and comply with the system of appropriation established by state law.

First, this position directly contradicts the *Winters* holding. Second, it wholly lacks any chronological perspective surrounding the development of the Wind River Indian Reservation and fails to address the question of what was the Congressional intent in 1868, the date of the treaty. Third, it requires placing a greater weight on a miscellaneous group of letters and documents than on a treaty of the United States. The precedent is well established that ambiguities must be construed in favor of the Indians and that any termination or diminution of the Indians' rights can be done only by express legislation or a clear showing of intent from surrounding circumstances.[54] The State of Wyoming fails to prove such a clear intent. While lengthy, bulky, and large in number, the exhibits presented lack the qualitative content necessary to support the State's argument and to dispute my conclusion that the Indians are entitled to a reservation of water by the Treaty of 1868.

3. Equal Footing Doctrine

One contested issue of law included whether or not the Equal Footing Doctrine dictates that by admitting Wyoming into the Union on equal footing with the original thirteen states, the Federal government did not intend to reserve water in the State of Wyoming.

This will be disposed of in short order.

In *United States v. District Court in and for County of Eagle, Colorado*, 401 U.S. 520, 91 S.Ct. 998, 28 L.Ed. 2d 278 (1971), the Supreme Court said:

> It is clear from our cases that the United States often has reserved water rights based on withdraw-

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[54] *Winters*, at p. 577; *Colville Confederate Tribes v. Walton*, 647 F.2d 42, 50 (9th Cir., 1981).

> als from the public domain. *As we said in Arizona v. California, 373 U.S. 546, 83 S.Ct. 1468, 10 L.ED. 2d 542, the Federal Government had the authority both before and after a State is admitted into the Union 'to reserve waters for the use and benefit of federally reserved lands.' Id.*, at 597, 83 S.Ct. at 1496. The federal reserved lands include any federal enclave. (Emphasis added)

In addition, the Equal Footing Doctrine does not command that all states must enter the Union equal in economic stature and property rights to the original thirteen. Again, the Supreme Court said, in *United States v. Texas*, 339 U.S. 707, 70 S.Ct. 918, 94 L.Ed. 1221 (1950):

> The 'equal footing' clause has long been held to refer to political rights and to sovereignty. See *Stearns v. State of Minnesota*, 179 U.S. 223, 245, 21 S.Ct. 73, 81, 45 L.Ed. 162. It does not, of course, include economic stature or standing. There has never been equality among the States in that sense. Some States when they entered the Union had within their boundaries tracts of land belonging to the Federal Government; others were sovereigns of their soil. Some had special agreements with the Federal Government governing property within their borders. See *Stearns v. State of Minnesota, supra*, 179 U.S. pages 243-245, 21 S.Ct. pages 80-81. Area, location, geology, and latitude have created great diversity in the economic aspects of the several States. *The requirement of equal footing was designed not to wipe out those diversitities but to create parity as respects political standing and sovereignty.* (Emphasis supplied)

Thus, while the State of Wyoming entered the Union on par with the original states as regards sovereignty, it cannot be argued that the United States was forced

to transfer its ownership of the waters on all public lands to the state under the Equal Footing Doctrine. To do so expands the doctrine in a direction foreclosed by the clear statement of *United States v. Texas, supra.*

Mr. Michael D. White, as Master Referee in a recent Colorado adjudication, recognized that the Equal Footing Doctrine can have a direct effect on certain property rights where the property right is so identified with a sovereign power of government that it cannot be separated therefrom.[55] For example, this rule has generally been applied to uphold the transfer of ownership of the beds and shores of navigable streams from the United States to the states upon their admission to the Union. Mr. White made it clear in his Report that the rule cannot be extended to prohibit the establishment of Federal reserved rights, before or after statehood.

I concur, and find that the property interest Wyoming has in the ownership of her waters is not so identified with state sovereignty as to invoke the Equal Footing Doctrine.

B. PURPOSES

Once a determination is made that Congress did intend to reserve water for the Reservation by the Treaty of 1868, the next question which must be answered is what Congress intended as the purposes for the use of that water. While the respective parties are not in complete disagreement on this issue, this particular question has been the subject of several pages of briefs submitted and fine distinctions and arguments drawn by all parties involved.

The United States maintains that the Reservation was established to provide a permanent home for the Indians. As such, the United States contends that any purpose which furthers the goal of establishing that permanent

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[55] *United States v. Oregon*, 295 U.S. 1, 55 S.Ct. 610, 79 L.Ed. 1267 (1935); *United States v. Texas, supra.*

home is valid and should be included in quantifying the amount of water to which the Indians are entitled.[56] The proposed purposes include argriculture, livestock, fisheries and wildlife, mineral development, municipal and industrial uses, and aesthetics. It is finally argued that the water to satisfy the above purposes must be measured by keeping in mind not only the present but the future needs of the Reservation.

The State of Wyoming, while reserving its position that no reservation of water exists at all, maintains that if a reservation does exist, it exists only for the minimal amount of water necessary to prevent the purposes of the Reservation from being entirely defeated.[57] The State of Wyoming argues that the purpose of the 1868 Treaty and of the Government's intentions in entering into such a Treaty was to convert the Indians from a nomadic life to an agricultural one. As such, the State admits within the scope of this argument that the purposes of the Reservation are for domestic, agricultural and stock watering uses only.[58] The State of Wyoming specifically denies that the purpose of the Reservation was for a "permanent homeland."[59] It is argued that the "permanent homeland" language found in the Treaty of 1868 was included to set a time frame for the duration of the

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[56] Legal Parameters for United States' Statement of Claims, filed March 5, 1980, p. 6.

[57] State of Wyoming's Response to the United States' Statement of Claims and to the Statement of the Shoshone and Arapahoe Tribes Concerning the Measurement of Tribal Reserved Water Rights, filed July 16, 1980, p. 11.

[58] State of Wyoming's Response to the United States' Statement of Claims and to the Statement of the Shoshone and Araphoe Tribes Concerning the Measurement of Tribal Reserved Water Rights, filed July 16, 1980, p. 12.

[59] Wyoming's Brief in Support of Its Response to the Claims for Water Rights of the United States and the Shoshone and Arapahoe Tribes, filed July 16, 1980, p. 36.

Reservation and was not intended by Congress as evidence of the principal purpose of the Reservation. The State concludes by asserting that it is not before me to decide whether Congress was right or wrong in creating a Reservation with the purpose of converting the Indian way of life from a nomadic to an agrarian one, but rather to determine that such an intent was, in fact, the purpose of Congress in ratifying the Treaty of 1868.

Counsel for the Shoshone and Arapahoe Tribes begin with a basic premise which agrees with the argument of the United States, but seeks to have those purposes applied in a somewhat different manner. The Tribes also contend that the purpose of the Reservation is to provide a permanent homeland for the Tribes and, in so doing, provide sufficient water for the Indians' use in deriving a maximum benefit from all of the assets of that homeland.[60] The Tribes conclude that when applying the purposes to a quantification of the water, those purposes must be broadly interpreted so as to permanently provide for the needs of the Reservation, envisioning a determination of future as well as present needs.

As in the discussion of Congressional intent, it is equally important here to rely on the Treaty of 1868 and relevant United States Supreme Court case law which has interpreted either that specific Treaty or treaties with other western Indians during the relatively same time period in our history. By doing so, and by applying that relevant case law to our situation, it is my conclusion that the principal purpose of the United States in entering into the Treaty of 1868 was to provide a permanent homeland for the Indians so that they may, in whatever way most suitable to their development, es-

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[60] Pre-Trial Brief of the Shoshone and Arapahoe Tribes with Respect to Purposes and Legal Standards for Measurement of the Tribes' Reserved Water Rights, filed April 7, 1980, p. 6.

tablish a permanent civilization on the Wind River Indian Reservation. To accomplish that purpose, the reservation of the use of water must include that water necessary to provide for the Indians not only in their agricultural development, but also in the raising of livestock, the assurance that fish and wildlife will also be available for their use, the development of the minerals that may be found on the Reservation, the growth and provision for municipal and industrial civilization, and for protection and preservation of the aesthetic natural conditions found on the Reservation.

The Treaty of 1868 contains several provisions, the reasonable interpretation of which can only lead one to conclude that the purpose of the Treaty was to provide a permanent homeland for the Indians. Article II of the Treaty states that the Reservation "shall be, and the same is set apart for, the absolute and undisturbed use and occupation of the Shoshone Indians herein named. . . ." [61] Article IV refers to the Reservation as the "permanent home" of the Indians and Article VII refers to the desire of the United States to "insure the civilization of the tribes entering into this Treaty". In order to insure this goal, the other provisions of the Treaty provide that the United States will provide an agent, a physician, teachers, other trained personnel, and will provide the facilities necessary for educating the Indians.

Analyzing the Treaty in its entirety, with specific reference to the above cited provisions, it is not at all unreasonable to conclude that the principal purpose for entering into this Treaty was to provide the Indians with a homeland where they could establish a permanent place to live and to develop their civilization just as any other nation throughout history has been able to develop its civilization. Agriculture has historically held an early position in the chronology of events of development.

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[61] Plaintiff's Exhibit WRIR I & P 1, United States Exhibit WR-1.

That does not mean that it must be the only means of civilization or the end of the development of a given civilization. The United States itself is rich in a history of development which had its beginnings with agriculture. It is from that agricultural beginning that a civilization can grow and develop and to maintain that the Indians must be limited to only an agricultural way of life is to narrowly and unreasonably limit the terms of the Treaty entered into by a Congress and a nation whose own history surpassed the narrow parameters of a solely agricultural civilization.

Relevant Supreme Court case law not only supports the above conclusion, but dictates such a conclusion. The *Winters* decision sheds little light on the discussion of purposes, but it does provide a meaningful basis from which one can begin to analyze the question. The court in that case set down the rule and established the beginning of a line of authority which maintains that when examining an Indian treaty and determining the basis and reasons for the terms provided in the treaty, one must always give benefit to an interpretation in favor of the Indians, to resolve ambiguities in favor of the Indians, and, whenever possible, to interpret provisions in an expansive rather than a limited manner.[62] The *Shoshone Tribe* case provides an excellent precedent by which to discuss the question of purpose, for in that case the United States Supreme Court directly considered the Treaty of 1868.

The *Shoshone Tribe* case was the result of an action brought by the Shoshone Tribe to recover the value of part of its Reservation taken by the United States when the Arapahoe Indians were placed on that Reservation. The Tribe contended, and the Court of Claims concluded, that in determining the amount of compensation,

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[62] *Winters*, at pp. 76-77; *Arizona v. California*, *supra*; *United States v. Shoshone Tribe*, 304 U.S. 111, 82 L.Ed. 1213 (1938).

value should be given to the timber and mineral resources within the Reservation. The ultimate question for the Supreme Court to determine on appeal was whether the Treaty of 1868 had intended, as part of its purpose, to transfer ownership of, and therefore the value relating to, the timber and any mineral resources found within the boundaries of the Reservation. The court ruled that the Shoshone Tribe was entitled to any value attributable to the timber and minerals with the Reservation and that such was part of the purpose of the Reservation. In reaching this conclusion, the court extensively discussed the principal purpose of the Reservation and through this discussion shed some very valuable light on the question involved here.

After enumerating the provisions of the Articles of the Treaty stated above, the court then considered the history of the development of the Reservation.

> "Upon consummation of the Treaty, the tribe went, and has since remained, upon the reservation. It was known to contain valuable mineral deposits—gold, oil, coal and gypsum. It included more than 400,000 acres of timber, extensive well-grassed bench lands and fertile river valleys conveniently irrigable. It was well protected by mountain ranges and a divide, and was the choicest and best-watered portion of Wyoming." [63]

In considering the question before it, the Supreme Court was required of necessity to examine the Treaty and discuss the reasons and purposes for the United States entering into the Treaty. In beginning such a deliberation, the Supreme Court once again reiterated the relative positions of the United States and the Tribes and that the need existed to interpret those provisions keeping the welfare and benefit of the Indians in mind.

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[63] *United States v. Shoshone Tribe, supra.*, at p. 114.

> "They [treaties between the United States and Indians] are not to be interpreted narrowly, as sometimes maybe writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them."

With that understanding, the Supreme Court held that the principal purpose of the Treaty was:

> ". . . that the Shoshones should have, and permanently dwell in, the defined district of country. To that end, the United States granted and assured to the Tribe peaceable and unqualified possession in perpetuity. Minerals and standing timber are constituent elements of the land itself." [64]

Obviously, the *Shoshone Tribe* case did not concern water rights appurtenant to the Reservation and therefore cannot be considered dispositive of this issue. Nevertheless, the Court was very forceful and direct in its discussion of the Treaty and very clearly indicated its position concerning the extent and nature of the purpose of the Treaty. Applying the thrust of the Court's argument to the facts involved here, I conclude that Wyoming's proposed interpretation of the Treaty's purpose is far too restrictive and an unrealistic appraisal of the facts and situation existing at the date of the Treaty, and of the purpose for which Congress entered into the Treaty.

A reliance on *Shoshone Tribe* case does not require of necessity a conclusion that only the purposes discussed in that case are applicable here. The parameter of that decision was to determine whether the purpose of the Reservation included the granting of timber and mineral resources to the Indians, and not to determine the complete context of the purpose of the Treaty. Therefore, it is wholly consistent to maintain that the nature of the

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[64] *United States v. Shoshone Tribe, supra.*, at p. 116.

purpose determined above is supported by the philosophy and discussion of the *Shoshone Tribe* decision.

V. WIND RIVER INDIAN RESERVATION CLAIMS FOR WATER

A. As ADVANCED BY THE UNITED STATES

On March 6, 1980, the United States filed its Statement of Claims on behalf of the Tribes. It listed an annual diversion requirement of over 640,000 acre feet of water, all but approximately 10,000 acre feet of which was claimed under *Winters* or reserved right priority date of July 3, 1868, and the 10,000 acre feet a reserved right corresponding to the priority dates of State permits and certificates issued to the Tribes by the State of Wyoming.

The original Federal Statement carried these claims in the following categories, locations, and amounts:

ASSESSED NEEDS:

Irrigation	Practicably [65] Irrigable Acres	Acre-Feet [66]
Wind River		
Historic	11,230	51,892
Future	62,606 [67]	221,520
Subtotal	73,836	273,412
Dinwoody Creek		
Historic	5,042	25,140
Future	752	3,760
Subtotal	5,794	28,900

[65] These figures represent only land held in trust by the United States for the Indians of the Wind River Indian Reservation.

[66] These figures represent diversion requirement.

[67] Feasibility studies have not as yet been completed on 1,018 of these acres.

Little Wind River		
Historic	27,407	122,793
Future	19,619 [68]	60,702
Subtotal	47,026	183,495
Popo Agie River		
Historic	2,020	9,090
Future	4,963	20,084
Subtotal	6,983	29,174
Owl Creek		
Historic	0	0
Future	615	1,962
Subtotal	615	1,962
Red Canyon Creek		
Historic	268	1,072
Future	0	0
Subtotal	268	1,072
Mud Creek		
Historic	553	2,212
Future	0	0
Subtotal	553	2,212
Bull Lake Creek	29	116
North Fork Wind Creek	56	224
Crow Creek	1,200	4,800*
Dry Creek	2,579	10,316*
Meadow Creek	194	776*
Willow Creek	185	740*
Big Dry (Pasup) Creek	743	2,972*
Five Mile Creek	418	1,672*
Muddy Creek	3,680	14,720*

[68] Feasibility studies had not as yet been completed on 18,595 of these acres.

Irrigation	Practicably Irrigable Acres	Acre-Feet
Cottonwood Creek	603	2,412*
Surrell Creek	27	108*
Sage Creek	2,005	8,020*
Crooked-Trout	692	3,014*
Mill Creek	43	187*
	147,534	570,304
TOTAL IRRIGATION:		570,304 a.f.

* See footnote 69.

Livestock Industry [70]	Acre-Feet
Wind River	
Historic	812
Future	401
Subtotal	1,213
Little Wind River	
Historic	326
Future	160
Subtotal	486
Popo Agie River	
Historic	91
Future	48
Subtotal	139
Bighorn River (Owl Creek and Red Canyon Creek)	

[69] Historic water requirements consume the direct flow hydrologic potential of these creeks. Therefore, a claim is made for the noted water requirement or all of the direct flow of the creek, whichever controls.

[70] This includes the water needed to develop only trust assets held by the United States.

Historic	625	
Future	310	
Subtotal	935	
TOTAL LIVESTOCK INDUSTRY:		2,733 a.f.

Municipal, Domestic and Commercial [71]

Wind River		
Historic	455	
Future	590	
Subtotal	1,045	
Little Wind River		
Historic	450	
Future	590	
Subtotal	1,040	
Popo Agie River		
Historic	45	
Future	60	
Subtotal	105	
Groundwater (Wind River Formation)		
Historic	705	
Future	915	
Subtotal	1,620	
TOTAL MUNICIPAL, DOMESTIC AND COMMERCIAL:		3,810 af.

Sufficient groundwater to maintain the surface condition and the well levels of the Wind River Indian Reservation in their naturally occurring state.

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[71] This includes the water needed to develop only trust assets held by the United States.

Oil Development**		
Wind River		
Historic	1,694	
Future	306	
Subtotal	2,000	
TOTAL OIL DEVELOPMENT:		2,000 a.f.
Coal Development**		
Wind River		
Historic	0	
Future	3,450	
Subtotal	3,450	
Groundwater (Wind River Formation)		
Historic	0	
Future	900	
Subtotal	900	
TOTAL COAL DEVELOPMENT:		4,350 a.f.
Gas Development**		
Groundwater (Wind River Formation)		
Historic	135	
Future	631	
Subtotal	766	
TOTAL GAS DEVELOPMENT:		766 a.f.
Uranium Development**		
Wind River		
Historic	0	
Future	450	
Subtotal	450	
Groundwater (Wind River Formation)		
Historic	0	
Future	10	
Subtotal	10	
TOTAL URANIUM DEVELOPMENT:		460 a.f.

Phosphate Rock Development**		
Little Wind River		
Historic	0	
Future	318	
Subtotal	318	
TOTAL PHOSPHATE ROCK DEVELOPMENT:		318 a.f.
Gypsum Development**		
Groundwater (Park City Formation)		
Historic	0	
Future	325	
Subtotal	325	
TOTAL GYPSUM DEVELOPMENT:		325 a.f.
TOTAL DIVERSION REQUIREMENT:		585,106 a.f.

** See footnote 72.

Reservoir Maintenance

The water to maintain the level of Washakie Reservoir at its total capacity of 7,940 acre-feet.

The water to maintain the level of Ray Lake at its total capacity of 7,140 acre-feet.

NON-CONSUMPTIVE RESERVED RIGHTS

Fisheries [73]		Cubic Feet Per Second
Wind River —Above Dinwoody Creek	Annually	5,005.0

[72] This includes the water needed to develop only trust assets held by the United States.

[73] Water for this need is in the nature of an instream flow for reservation needs. In the event actual diversion reaches a level which would adversely impact upon the flows for fisheries, the right to develop storage to satisfy both needs is claimed.

Fisheries		Cubic Feet Per Second
—Between Dinwoody and Bull Lake Creek	Annually	4,608.0
—Between Bull Lake and Diversion Dam	Annually	5,867.0
—Between Diversion Dam and LeClair Canal	Annually	3,972.0
—Between LeClair Canal and confluence with Little Wind River	Annually	3,972.0
—Below confluence with Little Wind River	Annually	3,972.0
—Wind River Canyon	Annually	4,380.0
—East Fork	Annually	1,049.0
Bull Lake Creek		
—Below Bull Lake	Annually	1,848.0
—Above Bull Lake	Annually	660.0
Little Wind River		
—North Fork	Annually	615.0
—South Fork (below Washakie Reservoir)	Annually	683.0
—Above Popo Agie River confluence	Annually	790.0
Popo Agie River		
—Below North and Middle Forks	Annually	1,210.0
—North Fork (Below North Fork Canyon)	Annually	538.0
Dinwoody Creek		
Before Dinwoody Lakes	Annually	672.0
Crow Creek		
—Above Crow Creek Canyon	Annually	96.5

ARAPAHOE RANCH

ACQUISITION DATES:[74] April 10, 1941
August 25, 1941
July 14, 1948

PURPOSE: Provide a permanent home for and civilization of the Tribes.

ASSESSED NEEDS:

Irrigation	Practicably Irrigable Acres	Acre-Feet
Own Creek		
Historic	2,512	10,408
Future	0	0
Subtotal	2,512	10,048
TOTAL IRRIGATION:		10,048 a.f.

The irrigation needs of this portion of the Owl Creek Drainage are satisfied by the following state-recognized water rights acquired with the land. The United States' claims the right to use the water represented by the following certificate and permit numbers as of the priority dates listed.

Priority Date	Permit Number	Cubic Feet Per Second
Oct. 1, 1884	Terr.	5.39
June 1, 1887	Terr.	11.46
Oct. 4, 1889	2036	1.82
July 11, 1902	4038	6.84
Aug. 22, 1907	8125	4.74
May 8, 1909	9050	2.23
June 1, 1909	2058E	2.21
June 10, 1909	2059E	1.56
Sept. 17, 1909	9346	2.52
Sept. 17, 1909	2125E	4.72
Oct. 26, 1909	2368E	25.00

[74] See United States' Statement of Geographic Boundaries, pp. 2-3, for legal descriptions of land acquired.

Priority Date	Permit Number	Cubic Feet Per Second
Aug. 19, 1908	8721	6.63
May 15, 1909	9058	0.45
Sept. 12, 1910	10126	9.23
Sept. 24, 1906	7426	0.24
May 16, 1912	11707	0.91
June 20, 1904	6221	1.11

Far and away the largest encompassed use is irrigation and smaller percentages are devoted to mineral development (industrial), aesthetics, livestock, domestic use, municipal and commercial uses, reservoir maintenance, and instream flows of named tributaries to the Big Horn River, Greybull River, Nowood River, Popo Agie River, Shoshone River, Wind River and Yellowstone River for fish maintenance and wildlife habitat.

The claims above totalled 580,752 acre feet of water diverted annually to serve 147,041 acres of irrigated, or practicably irrigable, land. Of this, 272,724 acre feet was to serve the 61,486 acres claimed to be under historic irrigation, including some idle acres and acres within project lands on the Reservation, and the remaining 308,028 acre feet of annual diversion for a proposed 85,555 acres of future projects. The United States' acreage claim for new or "future" projects was subsequently reduced to 53,760 as the result of Federal witnesses' testimony.

The lesser requests included about 5,000 acre feet annually for livestock use, 7,620 acre feet for domestic, municipal and commercial use for the year 2020, 8,019 acre feet annually for both historic and mineral development; and volumes of flow for non-consumptive instream purpose. The United States reserved the right, in the event actual diversion reaches a level adversely affecting fisheries, to develop storage to satisfy both needs.

The United States claimed the entire flow of the following 64 streams for aesthetic and wildlife purposes. Virtually all are located in the two Aesthetic "Belt" areas.

Stream	Source
Springs	Tributary Dry Muddy or Cottonwood Creek
Four Mile Springs	Tributary Dry Muddy
Two Mile Springs	Tributary Dry Muddy or Cottonwood Creek
Morrison Spring	Tributary Dry Muddy or Cottonwood Creek
Springs	Tributary Mexican Creek-tributary Dry Muddy or Cottonwood Creek
Ingalls Springs	Tributary Dry Muddy or Cottonwood Creek
Red Springs	Tributary Big Horn River
Stanger Creek	Tributary Dry Muddy or Cottonwood Creek
Sheep Creek	Tributary Muddy Creek
West Fork Sheep Creek	Tributary Muddy Creek
East Fork	Tributary Muddy Creek
O'Shea Springs	Tributary East Fork Sheep Creek
Edmore Creek	Tributary Sheep Creek
Springs Creek	Tributary Edmore Creek
Shotgun Creek	Tributary Muddy Creek
Alkali Springs	Tributary Shotgun Creek
Flood Gulch or Draw	Tributary Shotgun Creek
Willow Creek	Tributary Muddy Creek
Round-up or Warm-springs Creek	Tributary Willow Creek
Holland Creek	Tributary Warm Springs Creek
Muddy Spring	Tributary Holland Creek
Deep Springs Creek	Tributary Holland Creek
Spring	Tributary Muddy Creek
Dry Muddy Creek	Tributary Muddy Creek
Red Creek	Tributary Dry Creek
Meadow Creek	Tributary Big Wind River

Stream	Source
South Fork Meadow Creek	Tributary Meadow Creek
Bobs Creek	Tributary Meadow Creek
Spring Gulch	Tributary Crow Creek
Dry Creek	Tributary Big Wind River
Dinwoody Creek	Tributary Dinwoody Creek
Red Creek	Tributary Big Wind River
Springs	Tributary Meadow Creek
Draw	Tributary Meadow Creek
Pine Creek	Tributary Willow Creek- Tributary East Fork North Fork Big Wind River
Spring	Tributary Trout Creek
South Fork Sage Creek	Tributary Sage Creek
St. Clair Creek	Tributary South Fork Sage Creek
St. Lawrence Creek	Tributary Sage Creek
North Fork Sage Creek	Tributary Sage Creek
Little Dry Creek	Tributary Dry Creek
Springs	Tributary Owl Creek
Mud Creek	Tributary Owl Creek
Middle Fork Mud Creek	Tributary Owl Creek
Hielschers Fork of Middle Fork Mud Creek	Tributary Owl Creek
Spring Draw	Tributary Mud Creek
Springs	Tributary Mud Creek
North Fork Mud Creek	Tributary Mud Creek
South Fork Mud Creek	Tributary Mud Creek
Spring	Tributary Owl Creek
South Fork Owl Creek	Tributary Owl Creek
South Fork Owl Creek and Springs	Tributary Owl Creek
Shoop Spring	Tributary South Fork Owl Creek
Red Creek	Tributary South Fork Owl Creek

Stream	Source
Spring No. 1	Tributary Red Creek
Spring No. 2	Tributary Red Creek
Spring No. 3	Tributary Red Creek
Spring No. 4	Tributary Red Creek
Spring No. 5	Tributary Red Creek
Rock Spring Creek	Tributary Red Creek
Dry Cottonwood Creek	Tributary Red Creek
Spring	Tributary Red Canyon Creek
Pevah Creek	Tributary South Fork Sage Creek

The Statement further asked for water to maintain levels of all lakes within the Wind River Indian Reservation in their natural state, except Bull Lake, Ocean Lake, Boysen Reservoir, Ray Lake, Washakie Reservoir, and Pilot Butte Reservoir. Water to maintain the levels of Washakie at its total capacity of over 7,000 acre feet, and Ray Lake at its total capacity of 7,140 acre feet were a part of this section of the claim.

B. AS ADVANCED BY THE TRIBES

On April 7, 1980, in their own behalf, the Tribes filed their Statement Concerning the Measurement of Tribal Reserved Water Rights, intended as supplemental to the above claims in their behalf issued by the United States. It added to the United States claim an additional 931,348 acre feet of water per year, bringing the total request for Indian reserved rights water to more than 1,500,000 acre feet per year, or roughly five times the water being diverted for historical irrigation and all other uses prior to this action for an adjudication. They are based as follows:

The Tribes first contention is that the water duty on claimed acreage should be increased to the same standard based on Wyoming law and used throughout Wyoming by the State Engineer's office, that is, 4.24 acre feet of

water per acre per year, which equates to the one cubic foot per second for each 70 acres set forth in the Statutes.[75] The volumetric claim of the United States on behalf of the Tribes divided by the total acreage claimed results in a water duty of 3.87 acre feet per acre per year, compared to the statutory 4.24 acre feet requested above. Thus, allowing this one Tribal contention would increase the annual diversion requirements by more than 55,000 acre feet per year.

The Tribes next claimed that Class V or subirrigated lands should be awarded full service irrigation. Assuming the Federal claim for partial irrigation of these same lands was based upon a one acre foot per acre per year standard for said lands, and applying the State standard of 4.24, the resulting increase would account for an additional 15,627 acre feet per year.

The Tribes then advanced a claim which the United States had not addressed; for water to irrigate lands owned in fee by individual Indians. This initial claim was for 9,657 acres of land at 4.24 acre feet of water per year, for an additional 40,945 acre feet per year. Paralleling this claim was an assertion that future Tribal reacquisitions should have reserved right water totalling 140,191 acre feet of water per year. This is based upon the hypothesis of Tribal reacquisition of all fee land in the Federal Irrigation Projects, Riverton Valley and LeClair projects at some time in the future, a total of 33,064 acres. Again, the State standard water duty unit was applied.

Next, the Tribes claimed an additional cultivable land base of 422,500 acres, to which they applied the State standard to compute an annual diversion requirement of 560,040 acre feet, and a 702 acre tract within the Riverton Reclamation Withdrawal Area at the State standard, for an additional 2,976 acre feet annually. This claim

[75] W.S. 41-4-317.

had not been addressed in the Statement of the United States.

The Tribes quantified their claim for evapotranspiration from reservoirs and requested 85,350 acre feet per year for said loss.

Additional municipal and industrial requests added another 31,000 acre feet annually, and 1,000 acre feet annually more than the United States claimed was included for prospective growth within the communities and for the lagooning of municipal waste waters.

The Tribes then claimed sufficient groundwater to maintain current levels in all acquifers, and to prevent mining of that groundwater by others, no matter where located, to sustain existing well production by them and their permittees, and to provide groundwater resources for future needs of the Reservation. No quantification was made for these purposes.

Excluding the groundwater claims, these additional requests at the time of the filing brought the initial total claim for reserved right water on the Wind River Indian Reservation to a total of 1,583,071.5 acre feet of water annually.

It is appropriate at this time to observe that during the long trial oftentimes admissions were made reducing certain claims. Supplemental pleadings were filed to reduce some totals, and following the submission of briefs and some of the rulings made without objections during trial, these totals were reduced by over 780,000 acre feet a year.

At the conclusion of the trial, the United States' final claim for irrigation had been re-adjusted at 367,426 acre feet annually to serve just under 60,000 acres of asserted historic lands, and just over 215,000 acre feet to serve 55,221 acres of future projects; in sum, a claim that

115,221 acres be found practicably irrigable, requiring an annual diversion of 582,414 acre feet of water.

The claim for aesthetics and wildlife purposes was reduced by the deletion of the following streams:

Stream	Source
South Fork Owl Creek	Tributary Owl Creek
South Fork Owl Creek and Springs	Tributary Owl Creek
Shoop Spring	Tributary South Fork Owl Creek
Red Creek	Tributary South Fork Owl Creek
Spring No. 1	Tributary Red Creek
Spring No. 2	Tributary Red Creek
Spring No. 3	Tributary Red Creek
Spring No. 4	Tributary Red Creek
Spring No. 5	Tributary Red Creek
Rock Spring Creek	Tributary Red Creek
Dry Cottonwood Creek Spring	Tributary Red Canyon Creek
Pevah Creek	Tributary South Fork Sage Creek

Except for the three items mentioned in the next paragraph, the final claim of the Tribes, at the close of evidence, for the most part concurred with that of the United States. Each had been reduced substantially. There had been an understanding of agreement in many instances except in the irrigation usage; and the unquantified claims for groundwater, with the right to mine groundwater, of course, at issue.

In the area of water claimed for irrigation, the Tribes asserted three additional concepts, none of which had been maintained by the United States. The first was for 10,374 acres of land calling for an annual diversion of 46,724 acre feet on behalf of individual Indians holding their land in fee. Next were two of the future projects

which the United States had deleted from their requests because of what they concluded were adverse economic considerations. They were the Big Horn Flats Extension, just over 9,000 acres of land calling for over 22,000 acre feet of water per year (which constituted the most economic and efficient water duty of any project, historic or future, on the entire Reservation), and an area of 897 acres on Stagner Ridge, requiring a diversion of 2,810 acre feet of water per year.

The Tribes continued to assert their request for 20% of the total Federal and Tribal claim for contingencies of land to be reacquired by the Tribes in the future; and a 20% increase in water to be used for municipal and domestic, and livestock, increasing to totals slightly larger than those on which the parties had agreed.

At the close of evidence, the exact quantifiable claims of the United States were as follows:

Use	Practicably Irrigable Acres	Annual Diversion Requirements in Acre Feet
Irrigation (Historic)	71,619	420,642
Irrigation (Future Projects)	55,221	215,882
TOTALS	126,840	636,524

	Acre feet Per year
Livestock from surface and shallow wells	2,730
Industrial from deep acquifiers	25,766
Municipal, Domestic and Light Commercial from surface and groundwater	2,371

The Indian claims paralleled the above except for the three additional requests mentioned just before the above tabulation.

There follows next my evaluation of the mounds of charts, graphs, maps, overlays, photos, brochures, tabulations, in evidence, and thousands of pages of testimony from which are adduced Findings of Fact and Conclusions of Law set forth in the sections, and near the end of the Report.

Part Two of this Report begins with this evaluation on existing Federal Irrigation Projects, and other parcels of land advanced as land "historically" irrigated. The evaluation regarding new or virgin turf that qualifies as practicably irrigable acreage follows thereafter in a section entitled "The Determination of Practicably Irrigable Acres on the Reservation's Future Lands", and the two Tribal claims then complete Part Two in a section entitled "The Determination of Practicably Irrigable Acres on the Reservation's Additional Tribes' Futures".

PART TWO

I. THE DETERMINATION OF PRACTICABLY IRRIGABLE ACRES ON THE RESERVATION'S HISTORIC ACRES

A. INTRODUCTION

The claims of the United States and Tribes for water on the Wind River Indian Reservation to irrigate land fall basically into two categories: water for lands now and historically irrigated, called the "Historic" acreage, and waters for lands not now irrigated but which would qualify now or in the future as practicably irrigable acres, called the "Future" acreage.

Historic use of water for irrigation includes waters for trust land unadjudicated but currently in use, adjudicated trust lands,[1] lands previously irrigated but currently idle,[2] lands not in use but irrigable from existing canals,[3] and Indian fee lands.

By category, acreage and water claims for said historically irrigated lands were as follows:

Historic Lands Category	Acres Claimed	Annual Diversion Requirement (acre-feet)
Adjudicated	17,411	97,404
Unadjudicated		
In-Use	34,427	222,915
Type VII	7,946	47,107
Type VIII	1,461	6,512
Indian Fee	10,374	46,704
TOTAL CLAIM, Historic Lands	71,619	420,642

[1] In this report, the term "adjudicated" means a parcel of land defined as one on which an uncancelled state awarded permit or adjudicated water right is in existence.

[2] Type VII lands.

[3] Type VIII lands, also referred to as undeveloped arable lands within the Wind River Federal Irrigation Projects (FIP's).

Total historic acreage claimed by the Tribes was never less than the above. In contrast, testimony produced by the State of Wyoming would level in the area of 4,261.67 acres [4] as practicably irrigable. This polar difference in acreage is consistent with the State's general position, as stated in its Response to Statement of Claims and brought out systematically in the opinions of its experts. That position, some of which I found to be persuasive, is generally that not all historically irrigated acres received water in sustained time frames: a) that some evidence showed several years of nonirrigation on certain lands and should therefore be excluded as being incapable of sustained irrigation, i.e., nonarable; b) that some of these acres are actually nonarable and evidence was introduced to support this claim; c) that much of the land claimed as PIA's would have benefit-cost ratios less than parity and thus would prohibit reasonable construction because of economic infeasibility; d) that valid State water permits still in existence and not cancelled or expired, dating 1905 and later, cover at least 86,000 acres on the Reservation; e) that agents of the Tribes, and the United States on behalf of the Tribes, as well as individual Indians, applied for State water permits in great numbers.[5] This was asserted to show the "state of mind" of the Tribal and Federal officials; that Wyoming was then and was to be the sole source for the right to use water within the Reservation boundaries.

It is necessary to address briefly the position of the State that virtually none of the historically irrigated lands should be accorded a reserved water right because of the failure of the Federal and Tribal experts to qual-

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[4] State's Proposed Findings, p. 1070. State witness Bishop actually accepted 31,217 acres of PIA's historically utilized on the Reservation, but this figure was a pre-economic analysis (Plaintiffs' Exhibit HFB 5-A).

[5] Plaintiff's Exhibit WRIR SR-3-Rev., SR-3, SR-4, SR-5 after the *Winters* decision.

ify it as not only arable, and irrigable, but practicably so. Practical irrigability is indeed the test, and Wyoming argues that this standard must be applied in the same form and essence of proof to all lands for which a water claim is made. This premise belies the actual facts in this case—that these "historic" lands include numerous farm fields, many a part of Federal Irrigation Projects long established on the Reservation, that are rich and productive and have been the basis of the agricultural life on the Reservation for decades, if not for the better part of the century. To require testing of these lands, as with future virgin turf, seemed unreasonable to me, and I believe my presumption of irrigability regarding these lands was fair and that all parties fairly understood it.[6] Like any other presumption, it asserts that the factual picture is sufficiently strong as to require an opponent's answer.

There are certain historic areas in which the testimony presented by the experts for Wyoming succeeded in persuading me of the merit of their contentions, thus I have reduced totals of the acreage claims accordingly.

B. METHODOLOGY

1. The Case of the United States

The United States conducted a sufficiently thorough investigation of the historic lands claims. Ronald Billstein, admitted as an expert in water resource planning, testified to the methodology employed under his direction by persons at H.K.M. Associates. The historic land base claim was first identified through office review and interpretation of 1979-1980 aerial photographs, water rights records, and documents showing unrecorded irrigation

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[6] See Adjudicated Lands section, *infra*, regarding the matter of a State awarded Permit or Certificate establishing a presumption of practicable irrigability.

of land. Later, field investigations were done to confirm or adjust the office findings.[7]

State permit boundaries and areas of irrigation on record with the Bureau of Indian Affairs, Fort Washakie Agency Office, were mapped on aerial photographs and assigned a number for identification. Principal service facilities were also noted on these photographs. Any overlapping or duplication of service areas was eliminated. Additionally, if proposed irrigation projects had never been constructed, those lands were excluded from the base.[8]

Initial documentation of unadjudicated in-use areas, those ditch systems not recorded with the State of Wyoming, was obtained from BIA publications. The portions of these areas outside the boundaries of adjudicated use were then marked on the aerial photographs.[9]

Photo interpretation of the 1979-1980 aerial photographs was supplemented by a review of aerial photographs dated 1936, 1939, 1948, 1954 and 1969. The comparison aided in the identification and documentation of the historic lands. Stereoscopic analysis was performed on all historic lands except within the Federal Irrigation Projects, where very complete maps of irrigation were available. Field inspectors utilized results of these large-scale stereoscopic plates for visual perspective of service to a tract, and then performed field inspection and utilized professional judgment to form their conclusions.[10]

The determination of irrigation in 1980 was not made on photo interpretation alone, even though infrared

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[7] Tr. p. 1901; p. 1897; United States Exhibit C-138, p. 2; Tr. p. 1925.

[8] Tr. p. 1917; Tr. p. 1946; Tr. p. 1904; United States Exhibit C-138.

[9] Tr. p. 1904; Tr. p. 1917; United States Exhibit C-138, p. 4.

[10] Tr. p. 1912; Tr. p. 2879.

photographs were available and utilized. The reviewing United States expert relied more on the notes of field investigators than on the infrared photographs for an impression of the vegetation in the area. These investigators noted their impressions of physical features of the land and the ability of surface water to fully service land tracts, which would not have been visible even on infrared photographs. Photographs show only one instant in time, giving only an indication of what the area looks like. Additionally, water assessment records and delivery system mappings were reviewed to document water usage for irrigation.[11]

The initial field inspection of identified areas was performed by surface vehicle or helicopter. Minor additional qualifying acreage, consisting of generally isolated tracts, was discovered and added to the study base. Eventually, every tract claimed as historically in use outside the FIP's was visited by investigators.[12]

The first component of a more extended field study involved review of the condition of diversion facilities. This established whether the facility examined had suffered a blowout [13] which would preclude continuing service without correction. It also showed the extent to which the diversion works were intact, the ditch or sprinkler systems operational, the extensiveness and definition of field laterals, and level of vegetation in the service area. Isolation of diversion works and vegetation in ditches was often deemed indicative on non-operation of the irrigation system, though it was noted that there were areas where the condition of the facilities indicated use within one or two years. A water line was considered to indicate use that year. The level or condition of vegeta-

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[11] Tr. p. 2649; Tr. p. 2610; Tr. 2622; Tr. p. 2624; p. 2630.

[12] Tr. p. 1926; Tr. p. 1986.

[13] Tr. p. 1927. Washout in ditch system or cross drainage dissecting ditch system.

tion in the service area would show whether an area had been irrigated within a year, or not for four or five years. Field personnel were allowed to make interpretations of use areas relative to whether they felt those lands were receiving full or partial service or seepage from canal systems.[14]

Instructions to eliminate acreage with physical obstacles were given to field investigators, and the study excluded all major drainage ways, major and secondary roads, major farmsteads, river bottom lands not receiving water from man-made delivery systems, and any other significant obstacles to farming. Dirt roads into fields were not excluded on the theory that they could be plowed and added to the field and therefore presented no major stumbling blocks to the irrigation of that field.[15]

Field work was checked by cross referencing with assessment and assessability records. Field findings were compared with results of SCS Irrigated Lands Inventory. A quality control check was made against infrared photography at approximately the quadrangle scale for 1974 through 1978. Reliability of the irrigation system, though it was noted that there were areas where the condition of the facilities indicated use within one year, was verified by actual visitation to a portion of tracts and on site review of the findings.[16]

Records defining trust acreage as of April, 1980 were used to screen ownership of the study areas remaining after the field inspection. Minor modifications were approved by the Fort Washakie Office of the BIA.[17]

I find the above testimony of Mr. Billstein to be professionally competent, credible and persuasive.

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[14] Tr. p. 1926; Tr. p. 2640; Tr. p. 2874; Tr. p. 1928.

[15] Tr. p. 2030; Tr. p. 2587.

[16] Tr. pp. 1935-39.

[17] Tr. p. 1918; Tr. p. 1920; United States Exhibit C-138, p. 5-6.

On-site hydrographic verification and soils classification studies were then undertaken under the direction of United States witness Albert Kersich, President of H.K.M. Associates on all lands in the office studies base. Mr. Kersich was admitted as an expert agricultural engineer. He continued to outline the methodology used by the United States experts, testifying that these office studies were supplemented, where possible, with interviews of landowners and lessees to determine "type of irrigation, crops grown, water supply, season of use, reasons for not irrigating idle lands, etc." Time was spent on the Reservation observing irrigation systems actually in use. The classifiers talked with the current regional soils scientist and some BIA personnel involved in irrigation management on the Reservation. Locations of irrigation facilities and levels of irrigation were noted for each tract studied. Soils on idle lands were field sampled, and in some cases lab tested, for arability. Again, necessary modifications, based on interview response and field verification thereof, were made to the total acreage claimed to reflect what was actually occurring in the field. The aerial photographs and field program results were then reviewed and the photographs were modified where necessary to accurately existing conditions. Summary of the study was done by a final planimetering and tabulation of acreage.[18]

I find the testimony of Mr. Kersich, not only on arability, but on all facets of his work, also to be professional, credible and persuasive.

Testimony on engineering studies and water requirements relative to the adjudicated, unadjudicated in-use and Type VII trust lands was presented by Thomas Stetson, president of Stetson Engineers, Inc., admitted in this

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[18] Tr. p. 1413; Tr. p. 1126. Hydrographic study of areas determined arable lands not served by existing permits. United States Exhibit C-138, p. 9; Tr. pp. 1925-28; Tr. p. 1938; United States Exhibit C-138, pp. 8-9; Tr. 2020.

case as an expert water duty engineer. Mr. Stetson also presented testimony on the costs of bringing the Type VII lands into service. Dr. Mesghinna presented similar testimony concerning the Type VIII lands.

Both experts found that the average overall efficiency in the project areas, based upon historic diversions, is 34.7%, or 35%. This is only if the diversion requirement of the Upper Wind Unit, which is 12.06 acre feet per acre, is excluded. This particular diversion requirement has been historically higher than the requirement for other units. The water diverted for this unit flows through the system, and the amount that is not consumptively used by the crops returns rapidly to the Wind River system. Mr. Stetson testified that this was the easier way to operate in some instances.[19] State expert Floyd Bishop agreed that the average overall efficiency is probably 35%. Both Mr. Stetson and Dr. Mesghinna assumed a 35% overall efficiency for the non-project lands.[20] I make a finding on this point later in this section.

Using aerial photographs and Dr. Mesghinna's climate zone maps, Mr. Stetson located historically irrigated non-project lands within the zones and determined the appropriate cropping pattern for them. He then derived the net irrigation requirement for each area. By dividing the net irrigation requirement by the overall efficiency of 35%, he calculated the diversion requirement for the historically irrigated trust lands outside the project areas, and did this tract by tract.[21]

Stetson Engineers examined aerial photographs and topographic maps locating parcels identified as arable Type VII land by Ross Waples of H.K.M. Associates.

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[19] Tr. p. 5358.

[20] Tr. pp. 5238-39; Tr. pp. 12167-68.

[21] Tr. pp. 5240-41.

Mr. Stetson then visited each of these tracts by helicopter to analyze their water requirements and the costs necessary to place the lands into full service. To determine these costs, he considered repair or replacement of headworks, diversion structures, canal extension or enlargement, head ditches on farm units, pumps, annual energy operating requirements and operation and maintenance of each parcel,[22] and developed estimates on a per acre basis which were then given to David Dornbusch, admitted as an expert in economic feasibility.

I find the evidence of the United States' witnesses Thomas Stetson and Dr. Mesghinna to be more persuasive at most significant points, and on the matters referred to above, I find their testimony credible and persuasive.

Economic evaluation[23] performed by United States' economist Dornbusch for the Type VII and Type VIII lands was similar to his analysis of the future projects, with the exception that economic feasibility was determined for each parcel within Type VII and VIII lands. The studies initially identified crops, crop yields, and crop prices.[24] For Classes 1 through 3 lands under full irrigation, the yields were projected to be the same as in the future projects for the same crops. Yields for Class 4 lands under water short supply are based upon discussions with various agricultural extension people in Wyoming. Crop prices for historic lands were obtained

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[22] Tr. pp. 5255-56.

[23] Tr. p. 4933. Economic evaluation seeks to determine the true value of the resources consumed and developed in the project, where "true value" is the value from the perspective of the people most concerned with the use and consumption of those resources. Tr. pp. 4939-40.

[24] Tr. p. 5719; United States Exhibit WRIRC-278; See Future Lands section, *infra*. Tr. p. 4939. Shown by benefit cost ratios. Tr. p. 5721 and p. 5754; Tr. pp. 4942-43; United States Exhibit WRIRC-278, pp. 18-19; Tr. p. 4951.

as for new project lands and in fact are the same for comparable crops. The price per ton of hay is the 1979 normalized price published for nurse oat hay and grass hay. The grazing and aftermath price is the same as in the new projects for aftermath per animal unit month (A.U.M.). In water short Type VII lands, the same prices are reflected as for hay and aftermath grazing on future lands. In Type VIII lands, prices were determined by project area.[25]

Based on the above, Mr. Dornbusch computed gross returns per acre, subtracting production costs per acre to obtain the net return per acre.[26] Production costs arise primarily from on-farm cultivation costs, including on-farm irrigation costs. Where lands are not as tightly clustered as in the future projects, some extra production costs were anticipated, such as the costs of extra handling and movement of essential equipment. Using fixed and variable cost analysis as in the future projects, the additional cost of equipment was computed, based on the types of equipment that would have to be moved, and the number and distances of moves within each cultivation operation.[27] He weighted net returns by crop distribution, percentage distribution, and crop mix.[28]

The cropping pattern for Type VII historic lands was predominantly nurse malt barley and alfalfa. Corn was not included, as its cultivation requires special equipment, and the concern was that there might not be sufficient Type VII lands to effectively allocate equipment use and that the Type VII lands were not close enough to project lands to use their equipment on a cooperative basis.

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[25] Tr. p. 5742, *et seq.*; Tr. p. 5719.

[26] Tr. p. 5719; United States Exhibit WRIRC-278, p. 20-22; Tr. pp. 5742-44.

[27] Tr. pp. 5750-51; Tr. p. 6172 *et seq.*; United States Exhibit WRIRC-278, pp. 20-35.

[28] Tr. pp. 5753-54; United States Exhibit WRIRC-278, pp. 36-37.

Both Dr. Mesghinna and Mr. Stetson made note of elevation differences and that factor's affect on growing season and suitability for crops, and different crop mixes were created for different classes of land, for full service and water short periods. In water short periods, Class 1 through Class 3 lands were allocated a mix of oat hay, nursing alfalfa and alfalfa, while the cropping pattern in Class 4 lands consisted of nurse oat hay and grass hay. This was also the crop mix for Class 4 lands under full water conditions.[29] The crop percentage distribution for Classes 1 through 3 lands is basically the same as shown for future projects, with the elimination of corn from the mix.

Recognizing that in agricultural economics, a future value is something less than the present value, Mr. Dornbusch multiplied the weighted average for highland and lowland acreage by the appropriate present value factor to determine net benefit figures. Cost adjustments for opportunity costs of labor[30] and for normalization[31] were performed to compute the system costs.[32] Finally, he divided the present value of the returns, or net benefits, by the present value of the irrigation system costs as furnished by Dr. Mesghinna and Mr. Stetson, to obtain the benefit-cost ratio. A benefit-cost ratio figure of less than one was considered economically infeasible. I find the above testimony of David Dornbusch to be professionally competent, credible and persuasive.

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[29] Tr. pp. 5741-42; United States Exhibit WRIRC-278, p. 19; Tr. p. 5719; Exhibit C-278, pp. 36-38; Exhibit C-271.

[30] Tr. pp. 4985-86; The true cost of a resource, here labor, in the production process, measured by the value of the next best use of that resource. Tr. p. 5913; Plaintiff's Exhibit ED-6; On the Reservation, where unemployment is both substantial and persistent, the opportunity cost of labor is zero.

[31] Tr. p. 4959; Application of weighting system to historic prices/costs to determine current prices/costs.

[32] Tr. p. 4992; Tr. p. 5719; Tr. p. 4985; Tr. p. 4958.

David Dornbusch, as the economic expert for the United States, and Ronald G. Cummings, recognized as an expert agricultural and water resources economist for the Tribes, used 4% as the real discount rate of interest to be applied to the costs of production on the historic lands. While it may seem low in these days of steady inflation, these figures relate to the nether world of benefit-cost ratio vocabularies.[33] The analysis of the United States' economic expert is that irrigation of the Type VII and Type VIII lands included in the final totals is economically feasible, and I so find, though some is excluded on other grounds.

Though the same above detailed economic analysis was not done for unadjudicated in-use areas, Mr. Dornbusch deemed them economically feasible from the fact that the lands were being irrigated and crops being grown thereon. In light of that fact, but with the exceptions noted hereafter, the testimony from area farmers and ranchers and the large market for growing crops, the irrigation of historic lands included within the final totals is generally feasible, and I so find.

No economic analysis was done on adjudicated areas. A ruling was made that an uncancelled state permit, or adjudicated certificate of appropriation, is *prima facie*[34] evidence of irrigability. United States experts accepted the certificates furnished by the State of Wyoming as having met the test of irrigability, and went no further in their scrutiny thereof.[35]

In summary, regarding the methodology of the United States' witnesses whose work is liberally footnoted in the section just completed, I find that it was competent, gen-

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[33] For a thorough discussion of discount basis, see same subject matter in the Future Lands section, *infra*.

[34] Tr. pp. 7205-06.

[35] Tr. p. 2477. See Adjudicated Lands section, *infra*.

erally convincing, and in most cases adequate in supporting Federal claims. The exceptions are evident in the several deductions I have made in acreage from said claims, where I have as an alternative accepted the testimony of State witnesses.

2. The Case of The Shoshone and Arapahoe Tribes

The historic lands portion of the Tribes' case, as noted above, included the establishment of a reserved water right for those individual Indians who hold land in fee. This claim was not addressed by the United States.

Keith Higginson, a consulting engineer who testified for the Tribes as an expert in water resources engineering, was the dominant witness in this portion of the claim. He initially gathered available land classification information and prepared a list of property owners for each tract. A worksheet was prepared and property boundaries plotted on aerial photographs. These were the hydrographic survey photographs used by H.K.M. in their study of the historic lands. Eventually, 42 tribal members or their direct descendants were interviewed to obtain information on their fee lands and the present and potential uses of water thereon.

His field investigation of Indian owned fee land involved three different visits to the Reservation for a total of 8 days in the field. During these visits, he observed 117 of 120 identified tracts. The use and condition of each field was noted, as well as the source and apparent conveyance system for irrigated lands. Additionally, he visited the Riverton Irrigation Project and discussed its organization and management with representatives of the United States Bureau of Reclamation.

He determined, from observation in the field and from study of available data and interviews, which tracts of land were presently irrigated and which were potentially capable of being irrigated, rather than practicably

irrigable. This type of determination was based on the Tribes' contention that another method of determination of practicably irrigable acreage was comparison with acreage currently irrigated. It was Mr. Higginson's professional opinion that the lands in his potentially irrigated category compared favorably to lands already receiving water and that they were located in areas where little cost would be required to place them in service.[36]

3. The Response of the State of Wyoming

The State of Wyoming refuted the above largely through State experts' review and criticism of the work performed by the Federal and Tribal experts. They criticized Federal arability studies on historic lands often on the same basis as criticism of the Futures, claiming the Federal studies were wholly inadequate. However, when confronted by the map showing the numerous holes used by HKM in its analysis, it was apparent that the State's soils expert, Clarence Fowkes, could not say he still felt the study inadequate.[37]

State expert Sommers pursued his analysis by counting holes shown on various documents and in some instances observing parcels from the road as he drove by. When asked which portion of a particular tract was arable, and the acreages of both the arable and nonarable portions, Mr. Sommers said he thought one would have to really visit the tract to tell exactly.[38] Another State expert, Leonard Rice, agreed field investigations are necessary and found it not good practice to make acreage determinations in office without the basis in reality that comes from field review.[39] This was the point raised by

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[36] Tr. p. 8150, *et seq.*

[37] Tr. p. 10735.

[38] Tr. p. 11149.

[39] Tr. pp. 9432-9434.

experts who actually went onto each tract in doing the Federal and Tribal studies. It is also one of the reasons I find the Federal and Tribal studies generally more credible, with noted exceptions to follow.

Continuing, the State called Mr. Henry Sostrom, a respected man of good professional reputation. In this instance, however, the State used him so broadly that his testimony was not always solid. While excellently qualified as a civil engineer in the field of highway construction in Wyoming, and also in the area of photo interpretation, he often was asked to testify outside his expertise, offering opinions as a solis scientist, an irrigation engineer, an agricultural engineer, an economist, and a statistician.

Additionally, Mr. Sostrom did not participate in the assessment of many tracts in a tract-by-tract analysis done by personnel with whom he had not previously worked, and was at times unable to explain why a tract may have been excluded from the final totals presented in his exhibits, often disagreeing with them.[40] Mr. Sostrom also admitted that office review of aerial photographs, without extensive ground-truthing, was not standard procedure for mapping irrigated lands.[41]

Although I have considered the testimony of both Mr. Sommers and Mr. Sostrom of limited significance for the above reasons, I have given them the benefit of the doubt they have raised in my mind about certain shortcomings in the Federal and Tribal claims. Acreage totals have thus been reduced accordingly, as noted in the following sections.

In considering Type VII and Indian Fee potentially irrigable acres, State economic expert James J. Jacobs

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[40] Tr. pp. 12681; Tr. pp. 13013-15; Tr. pp. 13036-37; Tr. pp. 12953-54.

[41] Tr. p. 12598.

made several assumptions which are clearly at odds with the reality of the circumstances now existing in the Division and likely to exist in the future. He assumed all of these parcels would be worked by existing irrigators and no unemployed labor would be used. This is possible, certainly, in some instances, but not all. Some of this land may be redeveloped with the Futures, and be tilled by presently unemployed labor. Additionally, it is impossible to ignore the recognized higher rate of unemployment on the Reservation.[42] Some of the unemployed may well be used if more land, including now idle land, is put into production.

Further afield, he assumed each tract of this land placed in production would require a full complement of new machinery, fully costed. He assumed, based on results of State expert Agee's interviews with area irrigators that as the limit under the law for families in the reclamation areas is 320 acres, the maximum size of a farm in the area would be 320 acres. Though acknowledging that Indian irrigators in the area are not held to that limitation, and admitting that some efficiency could be achieved on a larger unit, he held to this farm size through cross examination.[43]

This type of acreage limitation correspondingly limits the hours of usage of farm equipment. Dr. Jabobs testified that a bean hoe planter would only be used 12 hours per year, a rotary hoe only 14 hours a year. (I cannot help but believe he meant days, not hours.) On cross examination, he denied that additional hours of usage of that machinery on a larger size farm would result in greater efficiency. When asked to assume a bean planter could be operated ten times more efficiently if there were no acreage limitations, he felt the savings would be negligible and declined to consider that assump-

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[42] Tr. p. 5913; Plaintiff's Exhibit ED-6; Tr. p. 4985.

[43] Tr. pp. 14844, *et seq.*

tion realistic.[44] Essentially, he refused, even hypothetically, to consider a larger farming unit.

Applying Dr. Jacob's assumptions to a real situation, an existing irrigator with no restrictions as to the size unit he can operate is faced with the expenditure of many thousands of dollars in equipment costs alone should he decide to cultivate 80 acres of idle land contiguous to a 320 acre unit. This would be in spite of the fact he might use his existing bean hoe planter another three days a year on that additional 80 acres without obviously jeopardizing the timing of his operations or his crop because of any timing adjustment necessary for that additional use. It is also doubtful this would cause sufficient additional useage of the machine that any repair costs would greatly offset the additional returns of that 80 acres.

The inapplicability of Dr. Jacob's assumptions were further highlighted when an irrigator testifying at the last Worland hearings stated he operated a 1,000 acre farm/ranch. He thought it unrealistic and economically impractical to break that up in 320 acres units, each with its own contingent of farm equipment.[45]

I find the assumptions of the State's economist Jacobs hard to apply to the real world. In taking an inflexible position, he has biased his costs to the detriment of his analysis, which I must consider inadequate to advance the State's claim that the benefit-cost ratios of the historic lands studied are below unity.

It remains that the costs and returns advanced by the United States and the Tribes must be considered in light of the appropriate discount rate. Here, I refer to my consideration of this issue in the Futures section, *infra*.

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[44] Tr. pp. 14848-54.

[45] Tr. p. 14345W.

C. ADJUDICATED LANDS

Adjudicated historic lands, as noted above, are trust lands for which an uncancelled permit or certificate of appropriation has been issued by the State of Wyoming. These lands are located throughout the Reservation, but are predominate in the area of the Federal Irrigation Projects, served from the Ray, Coolidge and Sub Agency Canals in the Upper Wind Unit, the Wind River "A" and Dinwoody Canals in the Little Wind Unit, the Johnstown Unit, the Lefthand Unit, Midvale Irrigation District and Riverton-LeClair Irrigation District, all within the Wind River Basin and Little Wind River Basin. Throughout the years, even after the *Winters* decision, Indians and non-Indians alike were uncertain of the actual meaning of "reserved water rights." That confusion exists today. Persons taking title from Indians assert their ownership of a reserved water right, just as Indians assert their paramount right to reserved water. And yet, many persons have "protected" their water right by applying for and perfecting state awarded permits. Outside the Federal Irrigation Projects, a significant portion of Reservation lands have some sort of permit of record with the State Engineer's Office. This permitting seems to have been done, for the most part, between 1905 and 1915.[46]

Some evidence was introduced to reveal the uncertainty and confusion that followed the 1905 "opening up" of the Reservation, during which time the State issued permits to Tribal sources on the "diminished portion" as well as to the settlers on the ceded lands that had gone to patent.[47]

Further, the Federal parties argue that issuance of a State Permit is proof of the irrigability of these acres, and assert that the evidence of their qualification for a

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[46] Tr. pp. 1898 and 1946; Tr. p. 2562.

[47] Plaintiff's Exhibit SR-7.

reserved water right is contained in the very records of the State Engineer's office.[48]

I take departure from such a conclusion, but early in the proceedings did hold that such an uncancelled State Permit is *prima facie* evidence of irrigability of these tracts. A dialogue with counsel for the United States, Tom Echohawk, affirms that if said lands were to be excluded, evidence of said disqualification would have to be forthcoming from the State.[49]

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[48] United States' Proposed Findings, p. 279; "These records contain certification by officials of the State . . . that water was delivered to lands described and that such systems were placed therein so as to warrant adjudication by the State Board of Control."

[49] Tr. pp. 7205-09:

"THE SPECIAL MASTER: I have ruled it establishes prima facie case for irrigability.

* * *

THE SPECIAL MASTER: I would rather think that the fairest way to handle this question would be to put the burden of proof upon the State to show that if certain parcels on some of these areas are not yielding crops, have had a drainage problem, don't deserve water, so the speak, that I would consider to reduce the number of acres entitled to water on that type of evidence. Generally speaking, I'm going along with the presumption that if it had a water right issued to it, it's irrigable land. Whether it's entitled to a water claim for reserved water for it, and I don't think—we are not talking about too many acres in the first place, are we?

MR. ECHOHAWK: We are talking about approximately 17,000 acres, and that's our point exactly. The State of Wyoming has the same opportunity with regard to the adjudicated lands as they do with regard to the North Crowheart area. If they want to come in and put on evidence to show that that land isn't irrigable, is not irrigable by whatever method they choose to show, that's one thing.

THE SPECIAL MASTER: Whether it was irrigated and was not yielding productively and went into idle status for ten or

I have reviewed much of the evidence which the State experts presented, and many of my findings herein will result in subtractions from the claimed totals simply because I believe the State did indeed, on certain tracts, meet its duty to "come in and put on evidence to show that the land isn't irrigable."

The history and nature of the subject matter we are working with is replete with evidence of projects that began with apparent facts to warrant a certain acreage. In instance after instance, a project resulted of much less acreage either approved or authorized. Witness Sommers did indeed rebut the assumption of irrigability of all lands claimed by bringing out out several instances in his exhibits of questionable factual conditions pertaining to whether certain tracts should be given a reserved right.

While it is understandable that the Federal and Tribal attorneys may not share my belief that the evidence presented by the State met the Echohawk challenge to present "by whatever method they choose" evidence of non-irrigability, I believe it was accomplished, albeit not to the total of excluding "approximately 50% as nonarable" as was testified to by State expert Sommers.[50] I believe the totals of adjudicated lands entitled to a reserved right of water should be reduced by the following:

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fifteen years, because it was not productive land, I think that's acceptable evidence.

MR. ECHOHAWK: But because the land is currently idle, that in and of itself should not bump that land out. They should have to show something else, the same as North Crowheart is.

THE SPECIAL MASTER: No problem.

[50] Tr. p. 11017; Plaintiff's Exhibit SS-1001.

Land types known as "out" land (Type IX)	845.9
Class 6 lands	2,971.7
Class 6 lands	360.5 [51]
Retired lands	829.0
Type VIII lands with no economic analysis	10.0 [52]
TOTAL	5,017.1

While Mr. Sommers acknowledged that 116.5 acres noted as Class 6 land by him on Wyoming Exhibit SS-1002 were actually Type VII land and possibly arable, no economic analysis was performed on these acres; thus no showing of PIA was made.[53] For this reason, they cannot be added to the Type VII acreage awarded.

The State of Wyoming correctly argued that certificates are not proof of irrigability, and met the test in eliminating the 5,017.1 acres mentioned above, but generally did not, in my opinion, prove that water was not being beneficially applied on the remaining 12,395 acres.

There is ample evidence in the record to substantiate and support findings that Class 6 lands are not entitled to water rights on the same basis as lands Classed 1 through 4, and it is apparent that land classification requirements by the Bureau of Land Management were dealt with more rigidly than by HKM.[54]

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[51] Plaintiff's Exhibit SS-1002.

[52] Plaintiff's Exhibit SS-2.

[53] Tr. p. 12451.

[54] Plaintiff's Exhibit HB-51, for example, lists the following conversion record between Engineer Carl Johnson of the Midvale Irrigation District, and Loring Gurney and Ross Waples of HKM. Attempts were made to try to account for differences in acreage that the District shows to be irrigated as opposed to what HKM shows to be irrigated. "The only lands which the District can charge for are Classes 1 through 4. Class 6 lands can be irrigated through temporary water service contracts for a period of five

I therefore find that the 17,411 acres claimed by the United States as a measure of the reserved water right based upon adjudicated trust lands be reduced by 5,017 acres to an award of 12,395 acres as the measure, summarized as follows:

Little Wind Unit	457 Acres
Upper Wind Unit	445 Acres
Lefthand Unit	3 Acres
Wind River Basin	4,983 Acres
Little Wind River Basin	729 Acres
Bighorn River Basin	2,757 Acres
Popo Agie River Basin	303 Acres
Owl Creek Basin	2,718 Acres
TOTAL	12,395 Acres

A tract-by-tract analysis was completed using Sommers testimony and exhibits SS-1002 and SS-2, and adjudicated acreage deletions resulting therefrom were made, and are summarized by source, as follows:

Source	SS-1002 Class 6 Acres	SS-2 Type IX Acres	SS-2 Class 6 Acres	SS-2 Type VII Acres	TOTAL Acres
PROJECT LANDS (WRFIP)					
Little Wind Unit:					
Ray Canal		4.9		10.0	14.9
Coolidge Canal	___	76.0	99.2	11.0	186.2
SUBTOTAL		80.9	99.2	21.0	201.1
Upper Wind Unit:					
Dinwoody Canal		37.0			47.0 [55]
Lefthand Unit:	4.0	12.0	___	1.0	17.0
PROJECT LANDS SUBTOTAL	4.0	129.9	99.2	22.0	265.1

years. If after that time USBR deems the lands productive, then the Classes are changed to a pay class. At present, Indian lands are only receiving water on pay classes of land."

[55] Ten acres of Type VIII on Dinwoody Canal were also deleted. This was the only Type VIII land deletion made.

Source	SS-1002 Class 6 Acres	SS-2 Type IX Acres	SS-2 Class 6 Acres	SS-2 Type VII Acres	TOTAL Acres
NON-PROJECT LANDS					
Wind River Basin					
East Fork Wind River			228.3	9.0	237.3
Dry Pasup Creek		74.0	180.0	267.0	521.0
Crow Creek	116.5		282.9	180.0	579.4
Willow Creek				2.0	2.0
Main Stem Wind River	145.0	17.2	228.7	31.0	421.9
SUBTOTAL	261.5	91.2	919.9	489.0	1,761.6
Little Wind River Basin:					
North Fork Little Wind River			48.4		48.4
Mill Creek				9.0	9.0
Sage Creek	———	21.6	11.5	17.0	50.1
SUBTOTAL		21.6	59.9	26.0	107.5
Bighorn River Basin:					
Main Stem Bighorn River			61.0	11.0	72.0
Cottonwood Creek		14.7	10.0	58.0	82.7
Muddy Creek	———	10.0	597.7	143.0	750.7
SUBTOTAL		24.7	668.7	212.0	905.4
Popo Agie River Basin:					
North Fork Popo Agie		42.0	5.0	1.0	48.0
Main Stem Popo Agie	———	8.9	———	———	8.9
SUBTOTAL		50.9	5.0	1.0	56.9
Owl Creek Basin:					
South Fork Owl Creek	95.0	281.3	593.9	32.0	1,002.2
Main Stem Owl Creek		246.3	499.4	28.0	773.7
Mud Creek			125.7	19.0	144.7
SUBTOTAL	95.0	527.6	1,219.0	79.0	1,920.6
NON-PROJECT LANDS SUBTOTAL	356.5	716.0	2,872.5	807.0	4,752.0
TOTAL DELETIONS:	360.5	845.9	2,971.7	829.0	5,017.1

D. UNADJUDICATED IN-USE LANDS

Generally, unadjudicated in-use areas are unpermitted, and therefore unrecorded with the State Engineer's Office. In some instances these lands are associated with ditch systems documented by the Bureau of Indian Affairs. Other tracts were found by reviewing previous land use inventories, assessment and assessability records or by interviewing local residents.

The United States claimed water for 34,427 acres of land, lying outside adjudicated service areas, which is presently receiving irrigation water. As the *Winter's* doctrine speaks in terms of present as well as future uses, it would seem that the claim for water to serve currently irrigated lands would be the least controversial. However, the State argued that the claim fails for two reasons: (1) conceptual deficiencies, and (2) factual deficiencies.

Having addressed the State's conceptual deficiencies argument earlier, I consider here only the factual deficiencies claim. I find that the State's review of evidence presented by the United States' experts showed 3,575.9 acres of Class 6 lands in the unadjudicated in-use claim.[86] Throughout the hearing of this matter, I have accepted and been guided by the definition of lands set forth by the United States. Under that set of definitions, Class 6 land is that which does not meet the minimum standards or requirement for arability under the land class standards used by the Federal experts. There was no subsequent showing by the United States that these lands had not been classified "6" by their experts. This land must therefore be deducted from the total acreage claimed in this subcategory as being, essentially by admission, non-irrigable.

Additionally, 879 acres were discovered by the State's experts to have notations in the United States' evidence

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[86] Tr. p. 12441; Plaintiff's Exhibit SS-1000.

which discredit their irrigability.[87] I find these lands could not be practicably irrigable for the reasons found in the logs of the Federal experts, which also remained unexplained and unrebutted. State's expert Sostrom, in his review of United States' expert Billstein, found that 1,778 acres of subirrigated land had been included in unadjudicated in-use totals. Mr. Billstein admitted in testimony on March 19, 1981, that such land had been classified as nonarable acreage. There was no subsequent showing that the parcels claimed, or comparable parcels, were capable of sustaining irrigation over a period of time sufficient to overcome that nonarable classification. I find these acres are not practicably irrigable and have deducted them, as well as the acres highlighted by Mr. Sommers, from the final claim for unadjudicated in-use lands. Mr. Sommers pinpointed another 55.6 acres in this claim that are Type VII land. This acreage was not analyzed by Mr. Dornbusch for economic feasibility and therefore must also be deducted from acreage claimed as in-use or Type VII as acreage for which no showing of practicable irrigability was made.

The State also contended that two parcels of unadjudicated in-use land claimed as trust land are in fact owned by non-Indians. An examination of United States Exhibits C-317, C-317-1, and 317-2 confirms this statement. These parcels are deducted from the claim for this portion of the claim:

Parcel 8-7	
Midvale Irrigation District	
SW¼SW¼, Section 17, T2N R6E	8 Acres
Parcel 19-12	
Main Stem Wind River	
NW¼SE¼, Section 27, T4N, R3W	2 Acres
TOTAL	10 Acres

[87] Tr. p. 12444; Plaintiff's Exhibit SS-1001.

I therefore find that the 34,427 acres claimed by the United States as a measure of the reserved water right based upon unadjudicated in-use lands should be reduced by 6,298 acres to an award of 28,129 acres as the measure, summarized as follows:

Little Wind Unit	14,776 Acres
Upper Wind Unit	4,763 Acres
Johnstown Unit	426 Acres
Lefthand Unit	751 Acres
Midvale Irrigation District	561 Acres
LeClair Irrigation District	976 Acres
Wind River Basin	968 Acres
Little Wind River Basin	3,071 Acres
Bighorn River Basin	1,426 Acres
Popo Agie River Basin	152 Acres
Owl Creek Basin	259 Acres
TOTAL	28,129 Acres

A detailed study was made of the exhibits cited above. Unadjudicated acreage deletions were made therefrom and are summarized by source on the following tables:

UNADJUDICATED ACREAGE DELETIONS BY SOURCE

Source		Plaintiff's Exhibit SS-1000 Nonarable Acres	Plaintiff's Exhibit SS-1001 Miscellaneous Acres	United States Exhibit 317 *et seq.* Acres	Plaintiff's Exhibit HSO-2 2nd Rev. Acres	Total Acres
PROJECT LANDS:						
WIND RIVER FEDERAL IRRIGATION PROJECT:						
Little Wind Unit:						
Ray Canal		511.9	—	—	157.0	668.9
Coolidge Canal		1,097.1	—	—	66.0	1,163.1
Sub Agency Canal		420.4	15.2	—	57.0	492.6
	Subtotal	2,029.4	15.2	—	280.0	2,324.6
Upper Wind Unit:						
Wind River "A" Canal		19.1	115.4	—	—	134.5
Dinwoody Canal		—	28.0	—	705.0	733.0
	Subtotal	19.1	143.4	—	705.0	867.5
Johnstown Unit:		38.9	—	—	—	38.9
Lefthand Unit:		789.7	—	—	—	789.7
MIDVALE IRRIGATION DISTRICT:		—	—	8.0	—	8.0
RIVERTON-LECLAIR IRRIGATION DISTRICT:		93.7	201.6	—	—	295.3
TOTAL PROJECT ACREAGE DELETIONS:		2,970.8	360.2	8.0	985.0	4,324.0

UNADJUDICATED ACREAGE DELETIONS BY SOURCE

Source	Plaintiff's Exhibit SS-1000 Nonarable Acres	Plaintiff's Exhibit SS-1001 Miscellaneous Acres	United States Exhibit 317 *et seq.* Acres	Plaintiff's Exhibit HSO-2 2nd Rev. Acres	Total Acres
NON-PROJECT LANDS:					
WIND RIVER BASIN					
Dinwoody Creek	36.9	—	—	—	36.9
Dry Creek	—	113.9	—	—	113.9
Meadow Creek	3.5	—	—	—	3.5
Crow Creek	1.7	—	—	—	1.7
Willow Creek	6.5	—	—	—	6.5
Main Stem Wind River	5.6	—	2.0	—	7.6
TOTAL	54.2	113.9	2.0	—	170.1
LITTLE WIND RIVER BASIN					
North Fork Little Wind River	95.8	282.9	—	600.0	978.7
South Fork Little Wind River	70.4	—	—	186.0	256.4
Sage Creek	27.4	—	—	—	27.4
TOTAL	193.6	282.9	—	786.0	1,262.5
BIGHORN RIVER BASIN					
Cottonwood Creek	—	122.0	—	—	122.0
Five Mile Creek	95.3	—	—	—	95.3
Muddy Creek	234.7	—	—	—	234.7
TOTAL	330.0	122.0	—	—	452.0

POPO AGIE RIVER BASIN					
Main Stem Popo Agie	27.3	—	—	7.0	34.3
TOTAL	27.3	—	—	7.0	34.3
OWL CREEK BASIN					
Mud Creek	—	55.6	—	—	55.6
TOTAL	—	55.6	—	—	55.6
TOTAL NON-PROJECT ACREAGE DELETIONS:	605.1	574.4	2.0	793.0	1,974.5
TOTAL ACREAGE DELETIONS	3,575.9	934.6	10.0	1,788.0	6,298.5

E. TYPE VII LANDS

Type VII lands are trust lands now idle though formerly irrigated. In most instances these parcels are located near existing service works. Many lie adjacent to streams and rivers. They are generally small and often oddly shaped tracts.

Investigation of these lands was conducted by Federal consultants in the manner previously discussed. Each tract was visited. Soil samples numbering 1,084 were taken and lab analyzed.[58] For idle lands within existing projects, land classification standards were the same as for the Futures. Modifications concerning soil texture and drainage were made for the classification of Type VII lands outside the projects.

Further modifications were made for economic analysis. The United States economist, Dornbusch, used additional machinery costs for isolated idle parcels. He adjusted cropping patterns and reduced yields for Class 4 and water short lands. After his benefit-cost analysis at a 4% real rate of interest, the United States' evidence showed 7,946 acres remaining feasible out of the original Type VII claim of 8,002 acres.[59]

In historic, non-project, unadjudicated lands, I find that Mr. Sommers is correct in his observation that it was not a good practice to exclude the drainage requirement and depth of good, free-working soil in the non-project lands and standards.[60] One example of an errant result is cited in Mr. Waples failure to follow his own standards. Mr. Waples used his own judgment rather than the HKM standard in determining the arability of parcels with high alkalinity.[61] In addition, Mr. Waples

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[58] United States Exhibit C-226, pp. 12-13.

[59] Tr. p. 5759.

[60] Tr. pp. 11138-9.

[61] Tr. pp. 3601-13; Tr. pp. 3665-73.

classified forty-one tracts less than five acres in size. These tracts total 102.5 acres and require an annual diversion of nearly 600 acre-feet.[62] Also, it appears that Mr. Waples did not adhere to the minimum tract size standards for twelve tracts classified Class 2 gravity, which are less than ten acres in size. These are noted on Exhibit C-226 (Table 6 and 7).[63]

I cite this to sustain my finding that the arability conclusions of the Federal experts for Type VII lands had deficiencies which warranted subtracting the areas so removed from arable acres.

As with the adjudicated and unadjudicated in-use lands, the State noted several instances where the United States' experts' lands classifications were not followed. Mr. Sommers stated that his investigation of the exhibits and testimony showed numerous instances of such departure and he reduced his acreage opinion accordingly.[64] Comparison of the United States' arable land maps with acreage the United States' expert Dornbusch found economically infeasible reveals that many of the parcels so eliminated were classed either "Class 4 gravity/Class 4 sprinkler" or "Class 4 gravity/Class 6 sprinkler".[65] This is further support for my conclusion that Class 4 and Class 6, Type VII lands are simply too marginal to be awarded a finding of practicably irrigable acreage.

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[62] United States Exhibit WRIRC-226. Sixteen of these tracts were subsequently eliminated by Mr. Dornbusch, who, after analysis, found them to be economically infeasible. The remaining 25 tracts total 78.2 acres and, at 40% efficiency, require an annual diversion of 371 acre-feet.

[63] Three of these were also eliminated by Mr. Dornbusch after his economic analysis. The remaining nine tracts total 51.3 acres and, at 40% efficiency, require an annual diversion of 253 acre-feet.

[64] Plaintiff's Exhibit SS-7 Rev.

[65] United States Exhibits C-151 through 202.

It is therefore my finding that Class 4 and Class 6 lands should be excluded from Type VII lands. This exclusion results in the elimination of 1,546 acres with a total diversion of about 7,771 acre-feet.[66]

I find there was a relaxation of standards used by Federal experts on the Type VII's when applied to comparable Type VIII's in the historic lands, particularly in the non-project areas. This fact, coupled with the obvious concern regarding any land asserted as practicably irrigable that has appearances or evidence of a drainage problem, or that has nevertheless been idle for long periods, does in my opinion warrant exclusion. Furthermore, I have given credence to those portions of State witness Sommers' testimony which would justify exclusion of those lands which simply do not have sufficient depth to water table and consequently classify as wet lands, or subirrigated by seepage from adjoining irrigated lands, and therefore should not be given the consideration as practicably irrigable lands are are accordingly denied a reserved water right.

Careful review of the evidence of virtually all of the Federal experts in this regard, compared to that of State witness Sommers, was again indulged in by me in order

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[66] The State of Wyoming's Findings of Fact, p. 916, states as follows:

> The Bureau of Reclamation requires special engineering and economic analysis to support the inclusion of Class 4 in a determination of arability. Wyoming Exhibit SN-5 (Section 115.4.2B). Mr. Waples admitted that he and HKM did not conduct specific engineering and economic analysis prior to including Class 4 lands. TR 3546.
>
> The Bureau of Reclamation down-classed most Class 4 land to Class 6 in their drainage investigations on the Federal Irrigation Projects on the Reservation. Wyoming Exhibit WRIR SS-A6 (p. 7). In addition, the Bureau has never mapped Class 4 land in anticipation of irrigation on the Wind River Indian Reservation and adjacent areas. Wyoming Exhibits WRIR SF-1, SS-6 and SK-10.

to determine that measure of credit to be given to the subtractions from Federal totals in view of my general credence that the Sommers' position was well taken and that there was simply more Type VII lands considered arable than was factually the case.

This is not to say that I have departed from my general belief, repeated often in this Report, that by and large the work of the experts for the United States and the Tribes was professional, competent, believable and more worthy of consideration as foundation engineering data with which to begin the massively complex and painfully difficult job of determining practicably irrigable acres on this Reservation. It is to say that these experts are first engaged in the handling of tens of thousands of documents and figures with an inevitable factor of error in the daily operations so involved; that the business of agricultural science engineering and soil classification is not exact; and that competent men of good will and of total dedication to the truth can find wide disparities in their conclusions from similar sets of facts.

Comparison of Mr. Sommers' apt observations with Plaintiff's Exhibit WR1R HS-11, introduced on cross-examination of Mr. Stetson, shows that many of the parcels to which Mr. Sommers objected were indeed deleted by Mr. Dornbusch as economically infeasible. Adjustment during review was made for two parcels erroneously contained in the adjudicated and unadjudicated in-use totals. Additional parcels not meeting the standards of the United States bring the total of nonarable acres to 1,675. A tract by tract analysis of the deletions is set forth as follows, showing arable eliminations in Type VII lands final claim, taken from comparison of Plaintiff's Exhibit SS-7 Rev. and HS-11 with United States Exhibits C-136 through C-202:

TYPE VII ACREAGE DELETIONS

Source	Classification Gravity	Sprinkler	Acres
PROJECT LANDS:			
WIND RIVER FEDERAL IRRIGATION PROJECT:			
Wind River Unit:			
RAY CANAL			
Parcel 1-8x	Class 4	Class 4	64.2
Parcel 1-10x	Class 4	Class 4	43.1
Parcel 1-11x	Class 4	Class 4	15.0
Parcel 1-12x	Class 4	Class 4	38.1
Parcel 1-13x	Class 4	Class 4	27.2
Parcel 1-14x	Class 4	Class 4	23.6
Parcel 1-17x	Class 4	Class 6	10.9
Parcel 1-18x	Class 4	Class 6	40.6
Parcel 1-19x	Class 4	Class 6	11.4
Parcel 1-28x	Class 4	Class 4	44.1
Parcel 1-29x	Class 4	Class 6	13.0
Parcel 1-40x	Class 4	Class 6*	3.0
Parcel 1-41x	Class 4	Class 6*	3.0
Parcel 1-44x	Class 4	Class 3	23.4
Parcel 1-50x	Class 2	Class 6*	8.9
Parcel 1-57x	Class 4	Class 4	63.5
Parcel 1-59x	Class 4	Class 4	14.0
Parcel 1-60x	Class 4	Class 4	41.2
Parcel 1-61x	Class 4	Class 6	21.8
Parcel 1-62x	Class 4	Class 4*	4.4
	RAY CANAL TOTAL		514.4
COLLIDGE CANAL			
Parcel 2-16x	Class 4	Class 4	46.0
Parcel 2-24x	Class 4	Class 6	39.2
Parcel 2-25x	Class 4	Class 4	59.0
Parcel 2-26x	Class 4	Class 4	53.8
Parcel 2-28x	Class 3	Class 6*	23.4
Parcel 3-32x	Class 4	Class 6	10.7
Parcel 2-34x	Class 2	Class 6*	7.2
Parcel 2-35x	Class 2	Class 6*	8.5
Parcel 2-36x	Class 3	Class 6*	4.9
Parcel 2-55x	Class 3	Class 6*	1.0
	COOLIDGE CANAL TOTAL		233.7

TYPE VII ACREAGE DELETIONS

Source	Classification Gravity	Sprinkler	Acres
SUB AGENCY CANAL			
Parcel 3-10x	Class 4	Class 3	16.9
SUB AGENCY CANAL TOTAL			16.9
Upper Wind River Unit:			
WIND RIVER "A" CANAL			
Parcel 4-1x	Class 4	Class 4	39.6
WIND RIVER "A" CANAL TOTAL			39.6
Johnstown Unit:			
Parcel 6-3x	Class 4	Class 4	138.0
JOHNSTOWN UNIT TOTAL			138.0
Lefthand Unit:			
Parcel 7-3x	Class 6	Class 3	90.1
Parcel 7-10x	Class 2	Class 6*	9.7
Parcel 7-12x	Class 2	Class 6*	4.8
Parcel 7-21x	Class 6	Class 3	29.6
Parcel 7-22x	Class 3	Class 3*	2.0
LEFTHAND UNIT TOTAL			136.2
Riverton-LeClair Irrigation District:			
Parcel 9-4x	Class 3	Class 6*	4.7
Parcel 9-5x	Class 3	Class 6*	4.9
RIVERTON-LECLAIR IRRIGATION DISTRICT TOTAL			9.6
TOTAL PROJECT DELETIONS			1,088.4
NON-PROJECT LANDS:			
WIND RIVER BASIN:			
East Fork Wind River:			
Parcel 10-1x	Class 4	Class 6	41.0
Dry Creek:			
Parcel 12-1x	Class 3	Class 6**	3.5
Dry Fasup Creek:			
Parcel 15-3x	Class 2	Class 2**	2.0
Parcel 15-6x	Class 3	Class 3**	4.2
Parcel 15-7x	Class 4	Class 6	66.3
Parcel 15-8x	Class 3	Class 2**	4.7

* These parcels did not meet the size specifications required by United States' experts.

TYPE VII ACREAGE DELETIONS

Source	Classification Gravity	Sprinkler	Acres
Crow Creek:			
Parcel 16-3x	Class 4	Class 4	25.3
Parcel 16-4x	Class 3	Class 6**	3.6
Parcel 16-12x	Class 3	Class 2**	0.7
Parcel 16-14x	Class 2	Class 6**	1.5
WIND RIVER BASIN TOTAL			152.8
LITTLE WIND RIVER BASIN:			
North Fork Little Wind River:			
Parcel 22-1x	Class 4	Class 4	39.9
Parcel 22-2x	Class 4	Class 4	24.4
Parcel 22-4x	Class 4	Class 4	45.4
Parcel 22-9x	Class 4	Class 4	49.4
South Fork Little Wind River:			
Parcel 23-1x	Class 4	Class 4	15.3
Main Stem Little Wind River:			
Parcel 24-9x	Class 4	Class 4	37.8
Parcel 25-17x	Class 4	Class 4	57.7
Mill Creek:			
Parcel 37-1x	Class 4	Class 6**	4.6
Parcel 37-2x	Class 4	Class 6**	3.4
Parcel 37-3x	Class 4	Class 6**	1.1
Parcel 37-4x	Class 4	Class 6**	0.6
Crooked Creek:			
Parcel 26-1x	Class 4	Class 6**	2.6
Trout Creek:			
Parcel 27-2x	Class 4	Class 4	63.0
LITTLE WIND RIVER BASIN TOTAL			345.2
BIG HORN RIVER BASIN:			
Cottonwood Creek:			
Parcel 18-1x	Class 3	Class 6**	3.2
Parcel 18-3x	Class 3	Class 6**	4.7
Parcel 18-6x	Class 4	Class 4	39.8
Muddy Creek:			
Parcel 20-18x	Class 3	Class 6**	0.8
Parcel 20-19x	Class 3	Class 6**	1.1
BIG HORN RIVER BASIN TOTAL			49.6

TYPE VII ACREAGE DELETIONS

Source	Classification Gravity	Sprinkler	Acres
POPO AGIE RIVER BASIN:			
North Fork Popo Agie River:			
Parcel 31-1x	Class 4	Class 6	5.1
Parcel 31-2x	Class 4	Class 6	9.0
POPO AGIE RIVER BASIN TOTAL			14.1
OWL CREEK BASIN:			
South Fork Owl Creek:			
Parcel 33-2x	Class 3	Class 6**	4.9
Parcel 33-4x	Class 4	Class 1	8.0
Mud Creek:			
Parcel 35-2x	Class 2	Class 6**	8.0
Parcel 35-3x	Class 2	Class 2**	0.7
Parcel 35-5x	Class 3	Class 6**	3.2
OWL CREEK BASIN TOTAL			24.8
TOTAL NON-PROJECT DELETIONS			586.5
TOTAL PROJECT AND NON-PROJECT DELETIONS			1,674.9

** These parcels did not meet the size specifications required by United States' experts.

I therefore find that the 7,946 acres claimed by the United States as a measure of the reserved water right based upon Type VII lands be reduced by 1,675 acres to an award of 6,271 acres as the measure, summarized as follows:

Little Wind Unit	2,365 Acres
Upper Wind Unit	452 Acres
Johnstown Unit	51 Acres
Lefthand Unit	451 Acres
LeClair Irrigation District	90 Acres
Wind River Basin	572 Acres
Little Wind River Basin	1,759 Acres
Bighorn River Basin	277 Acres
Popo Agie River Basin	88 Acres
Owl Creek Basin	166 Acres
TOTAL	6,271 Acres

F. TYPE VIII LANDS

The next category of historic land claimed by the United States for the Tribes is Type VIII land and land within the Owl Creek Unit. This land has more of the attributes of the futures projects than of the land discussed immediately above as presently or previously irrigated. During the United States case in chief, counsel advanced evidence to support the claim of 1,461 acres of this land.[67]

Type VIII land lies within the boundaries of the Wind River Federal Irrigation Projects in the Upper Wind Unit, Coolidge Unit, Ray Unit, Subagency Unit and Johnstown Unit. The Owl Creek Unit does not lie within these boundaries. It was sometimes referred to as the Arapahoe Ranch and is located in some of the northernmost portions of the Reservation.[68] It was identified as future project land and its arability determined by HKM Associates and testified to by Mr. Kersich. Attorney Michael D. White for the State stipulated "that a comparison of the Type VIII lands and the Arapahoe ranch lands with the [Tribes' Exhibits M-1 and M-2 would disclose that those lands are currently in trust either for the tribes or individual Indians, or within the stipulated boundaries of the reservation, . . . and are not reacquired."[69] The land status indices introduced by Mrs. Eckman for the United States confirms this.[70]

The procedures used by the United States and the State to evaluate the Type VIII and Owl Creek Unit

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[67] United States Exhibit WRIR C-277.

[68] Tr. p. 5582.

[69] Tr. p. 5597.

[70] United States Exhibits WRIRC-317, C-317-1, C-317-2.

lands were very similar to those used by them respectively to evaluate the future projects.[71]

Dr. Mesghinna evaluated this portion of the historic lands claim for the United States in the same manner as he evaluated the projects mentioned in the Futures section hereof. Since the Type VIII lands are within the boundaries of existing projects, however, no costs for canals or related structures were estimated.[72] His designs were limited to lands classified Class 1, 2 or 3.[73]

Mr. Dornbusch for the United States reviewed Dr. Mesghinna's estimates, as he did for the Futures, and determined which parcels would provide sufficient economic return to justify their cultivation. Acres that could not be feasibly irrigated from a strictly engineering standpoint and those which would not be economically feasible to develop were eliminated from consideration and claim. Thereafter, Dr. Mesghinna excluded 5% of the remaining acreage to eliminate land on which farmsteads and other man made structures would interfere with its cultivation.[74]

As I have noted in my discussion of the Type VII land base, many parcels eliminated by the United States' economist Dornbusch were classed either Class 4 gravity/Class 4 sprinkler or Class 4 gravity/Class 6 sprinkler.[75] He also deleted land classed as Class 6 gravity/Class 4 sprinkler. These lands are too marginal to be used as a measure for a reserved right, as I have previously found regarding the Type VII lands. A review of United States

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[71] United States Exhibit WRIRC-226, p. 2; Tr. pp. 10963-64, Plaintiff's Exhibit SS-8 Rev.; Tr. pp. 14719-55, Plaintiff's Exhibits EJ-3, Part II, p. 19 and EJ-4, Part III, p. 16.

[72] Tr. pp. 5583-84.

[73] Tr. pp. 5588-89, United States Exhibit WRIRC-43, pp. 8-9.

[74] Tr. pp. 5604-5.

[75] United States Exhibit WRIRC-226.

Exhibits WRIR C-158 through C-202 and Plaintiff's Exhibit WRIR SS-7 Rev. shows that 179 acres in the Coolidge Unit are economically feasible, rather than the 200 acres claimed. These parcels are:

Number	Classification		Acres
	Gravity	Sprinkler	
Parcel 2-3x	Class 2	Class 1	35.7
Parcel 2-4x	Class 2	Class 2	43.1
Parcel 2-5x	Class 2	Class 2	100.2
		TOTAL	179.0

I therefore find that the 1,461 acres claimed by the United States as a measure of the reserved water right based upon Type VIII lands be reduced by 21 acres to an award of 1,440 acres as the measure, summarized as follows:

Ray Canal		28 Acres
Coolidge Canal		179 Acres
Sub Agency Canal		306 Acres
Upper Wind Unit		492 Acres
Johnstown Unit		190 Acres
Owl Creek Unit		245 Acres
	TOTAL	1,440 Acres

G. INDIAN FEE LAND

A total of 10,374 acres are claimed as practicably irrigable Indian fee land. The Tribes argue there are two ways to decide whether land on an Indian reservation is practicably irrigable and thus eligible for a reserved water right. The first is to compare that land to other lands and irrigation projects actually in operation in the West to determine if similar lands are being successfully irrigated. The second way is to use a formal benefit-cost analysis to determine practicability. Fairness requires that lands passing either test move closer to being held practicably irrigable.[76]

[76] Tribes' Brief, p. 16.

As evidence following the second test was introduced in nearly all instances, I need not consider the merits of the Tribes' test of similar land. In the one instance where the first test might have been persuasive as to the Indian owned fee lands claimed potentially irrigable, I find the Tribes failed to make out even a minimal case of practicable irrigability, or that those acres had any actual proof of being successfully irrigated.

Just as I cannot accept as totally credible Mr. Sostrom's testimony in areas in which he was not an expert, neither can I give complete credibility to Mr. Higginson's broad assertions of land similarity as evidence of practicably irrigable acreage. Although one of the nation's outstanding engineers and an admitted expert in water resources engineering, Mr. Higginson was not tendered nor accepted as an expert in soils science, agricultural engineering or economics. Yet he was asked to combine all these fields in making his conclusions with respect to the "potentially" irrigable Indian owned fee lands. His professional definition of irrigable land was land that is of a soil type and texture and the slopes are such, and it is within reasonable proximity to a water source, that with a usual amount of effort water could be brought to the land and it could grow agricultural crops.[77] While an erudite definition, it alone can hardly be the basis for an award of practicably irrigable acres.

On direct examination, though he testified that certainly economics and design are part of the determination of whether lands can be irrigated,[78] he admitted he made no economic inquiry regarding the lands to determine their similarity to those irrigated. He said he believed such economic and design analysis was part of the documents he reviewed. Though he considered alkaline soils to be practicably irrigable, he made no analysis as

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[77] Tr. p. 8053.

[78] Tr. p. 8054.

to the costs or extent of the amendments he felt would be required. Additionally, he made no determination as to whether solving drainage problems on certain parcels was within the economic production capability of that land.[79] His assumptions as to the inclusion of these types of analysis in the soils classifications of the documents he reviewed was not supported on the record, and I find his opinion, in comparison with the questions it raises, does not support the claim for "potentially" irrigable acres. A parcel by parcel analysis by this crietria results in 3,943 acres disallowed and deleted from the 10,374 acres claimed in this category, as set forth in the following tables.

Additionally, Mr. Sommers for the State pointed out that 276 acres of Indian fee land had been noted by the United States classifiers either as non-arable Class 6 or subirrigated land. For the same reason I disallowed this acreage in the adjudicated and the unadjudicated in-use claims, I find it should be eliminated from the acreage claimed by the Tribes on behalf of individual Indians. Where Mr. Sommers has noted an appropriate deletion and Mr. Higginson's classified some of that land potentially irrigable, the deletion is made first from the potentially irrigable acreage figures and then from the acreage actually irrigated. This occurred in two cases, parcels numbered 16 and 119, and they are shown along with the deletions discussed above.

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[79] Tr. pp. 8053, 8220 and 8237.

INDIAN FEE ACREAGE DELETIONS

	Higginson's Potentially Irrigable Classification	Plaintiff's Exhibit SS-1003 Sommers	Disallowed Total
	(Acres)	(Acres)	(Acres)
WIND RIVER BASIN			
Main Stem Wind River:			
Parcel 5	311	—	311
Parcel 6	59	—	59
Parcel 8	71	—	71
Parcel 9	350	—	350
Parcel 11	172	—	172
Parcel 12	82	—	82
Parcel 13	115	—	115
Parcel 14	169	—	169
Parcel 18	21	—	21
Parcel 29	37	—	37
Parcel 30	84	—	84
Parcel 31	94	—	94
Parcel 32	57	—	57
Parcel 34	50	—	50
Parcel 37	61	—	61
Parcel 54	286	—	286
Parcel 64	6	—	6
Parcel 66	52	—	52
Parcel 67	8	—	8
Parcel 69	80	—	80
Parcel 88	100	—	100
Parcel 91	153	—	153
Parcel 96	80	—	80
Parcel 97	80	—	80
Parcel 101	20	—	20
Parcel 104	45	—	45
Parcel 106	9	—	9
Parcel 108	35	—	35
Parcel 110	200	—	200
Parcel 112	25	—	25
Subtotal	2,912	—	2,912
Dry Creek:			
Parcel 53	293	—	293
Parcel 61	—	25	25
Parcel 62	19	—	19
Parcel 102	—	2	2
Subtotal	312	27	339

	Higginson's Potentially Irrigable Classification (Acres)	Plaintiff's Exhibit SS-1003 Sommers (Acres)	Disallowed Total (Acres)
Meadow Creek:			
Parcel 21	——	10	10
Subtotal	——	10	10
Willow Creek:			
Parcel 86	——	41	41
Subtotal	——	41	41
WIND RIVER BASIN TOTAL	3,224	78	3,302
LITTLE WIND RIVER BASIN			
Little Wind River			
Main Stem:			
Parcel 16	12	8	20
Parcel 28	17	——	17
Parcel 41	25	——	25
Parcel 57	9	——	9
Parcel 58	——	56	56
Parcel 70	49	——	49
Parcel 74	29	——	29
Parcel 75	30	——	30
Parcel 95	20	——	20
Parcel 124	17	——	17
Subtotal	208	64	272
North Fork Little Wind River:			
Parcel 48	——	10	10
Parcel 59	36	——	36
Parcel 93	——	40	40
Subtotal	36	50	86
South Fork Little Wind River:			
Parcel 27	7	——	7
Parcel 82	——	11	11
Subtotal	7	11	18
Sage Creek:			
Parcel 116	202	——	202
Parcel 119	10	73	83
Subtotal	212	73	285
LITTLE WIND RIVER BASIN TOTAL	463	198	661

	Higginson's Potentially Irrigable Classification (Acres)	Plaintiff's Exhibit SS-1003 Sommers (Acres)	Disallowed Total (Acres)
BIG HORN RIVER BASIN			
Dry Muddy Creek:			
Parcel 4	41	—	41
Subtotal	41	—	41
Maverick Springs Draw:			
Parcel 7	32	—	32
Parcel 103	5	—	5
Subtotal	37	—	37
Roundup or Warm Springs:			
Parcel 19	22	—	22
Subtotal	22	—	22
BIG HORN RIVER BASIN TOTAL	100	—	100
POPO AGIE RIVER BASIN			
Popo Agie River:			
Parcel 114	20	—	20
Subtotal	20	—	20
POPO AGIE RIVER BASIN TOTAL	20	—	20
OWL CREEK BASIN			
Red Creek and Springs:			
Parcel 17	104	—	104
Subtotal	104	—	104
Owl Creek:			
Parcel 100	32	—	32
Subtotal	32	—	32
OWL CREEK BASIN TOTAL	136	—	136
TOTAL DELETIONS	3,943	276	4,219

I therefore find that the 10,374 acres claimed by the Tribes as a measure of the reserved water right based upon individually owned Indian fee lands should be reduced by 4,219 acres to an award of 6,155 acres as the measure, summarized as follows:

Wind River Basin		4,350 Acres
Little Wind River Basin		1,325 Acres
Bighorn River Basin		35 Acres
Popo Agie River Basin		0 Acres
Owl Creek Basin		445 Acres
	TOTAL	6,155 Acres

H. DIVERSION REQUIREMENT AND SUMMARY ON HISTORIC CLAIMS

I note with concern the disparity between the diversion requirements developed by Dr. Mesghinna for the Type VIII lands and Mr. Higginson for the Indian fee lands, on the one hand, and the diversion requirements developed by Mr. Stetson for the remainder of the historic lands. After review of the evidence, a discussion of which follows, I find that the Mesghinna and Higginson figures are more in line with what is reasonable and with how this water should be managed. I find that an overall efficiency increase to 40% on the historic lands should be used to measure the reserved water right. The water duties for those lands, and thus the diversion requirements in acre-feet per acre annually, are correspondingly adjusted.

Thomas Stetson, president of Stetson Engineers, testified as an expert on behalf of the United States. His testimony concerned, among other things, water duties and diversion requirements. Initially he reviewed historic diversions, developed cropping patterns according to climate stations, and used the resulting consumptive use determinations to develop net irrigation requirements for historic lands. Stetson Engineers developed a water duty schedule for the future projects and historic lands [80] which shows a water duty significantly higher in most instances than that developed by Mr. Higginson for lands in the same area.

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[80] United States Exhibit 306.

In his review, Mr. Stetson noted that the range of efficiencies within the Federal Irrigation Projects ranged from 16.2% on the Upper Wind Unit to 39.5% on the Sub Agency Unit, for an average of 34.7% or 35%.[81] He used Dr. Mesghinna's range of efficiencies on the non-project lands, a general range of 29% to 37%, and again averaged to 35% overall.

Based on his review, it was Stetson's opinion that a 34% overall efficiency rate was achievable.[82] It was also his opinion that achieving better efficiency doesn't really involve a large cost investment, but sometimes involves simply better management to achieve that 35% figure.[83]

Keith Higginson for the Tribes developed his diversion requirement figures in much the same way as did Tom Stetson for the United States. Initially he gathered information on historic crop growth in the area from the BIA, USBR and other consultants in this case. He then developed a cropping pattern for the Reservation,[84] dividing the Reservation into upper and lower areas. He also relied upon information from the National Weather Service and from the State of Wyoming Planning Report No. 5, as well as weather information from stations at Dubois, Diversion Dam, Fort Washakie and Riverton.

After a review of the available published report, Mr. Higginson agreed with Mr. Stetson's historic efficiency

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[81] The agreed formula for the determination of annual diversion requirement is:

$$\frac{\text{Net Irrigation Requirement (NIR)}}{\text{[divided by] Overall Efficiency}} = \text{Annual Diversion Requirement}$$

Thus, the higher overall efficiency, the lower annual diversion.

[82] Tr. pp. 5237-39.

[83] Tr. p. 5490.

[84] Table III, p. 10, Tribes' Exhibit No. 8.

estimate of 35%. He felt that the use of sprinkler irrigation would improve such efficiency, but not much above 40%. He took the irrigation requirement he had calculated and divided it by the 35% efficiency figure to determine the diversion requirement. For the lower area he found this requirement to be 4.75 acre-feet per acre for gravity irrigation and 4.15 acre-feet per acre for sprinkler irrigation. In the upper area, these figures were 4.36 acre-feet per acre for gravity irrigation and 3.81 acre-feet per acre for sprinkler irrigation.

Mr. Higginson's figures are considerably more in line with the diversion requirements developed by Dr. Mesghinna for the Type VIII lands than with Mr. Stetson's figures for the remainder of the historic lands. Dr. Mesghinna, in his initial review of historic diversion requirements, found them "high", above five acre-feet per acre in most instances.[85] In developing the diversion requirements for the Type VIII lands, he used a methodology similar to that for the future projects described in the Futures section herein, with a few exceptions. The on-farm systems were designed for hand moved sprinkler irrigation rather than side roll sprinklers as were used on the future lands. Both HKM engineers and Dr. Mesghinna felt that almost all lands irrigable by gravity are irrigable with hand moved sprinklers. Costs were increased for this method of irrigation, and operation and maintenance costs were increased by $1.00 per acre. No provision was made for canals and related structures, as the Type VIII lands are located within areas of existing diversion works.[86]

Water duties developed by Mr. Higginson for the Indian fee lands and Dr. Mesghinna for the Type VII lands were closer to the estimated State standard for adjudi-

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[85] Tr. p. 4676.

[86] Tr. p. 5603.

cated lands set out in Mr. Higginson's report,[87] and to that testified to by the State's expert, Floyd Bishop.[88] Mr. Stetson's figures, in most instances, were higher than 5.2 acre-feet per acre annually, the State standard for a growing season from April 15 through Ocotber 15. Mr. Stetson used a five-month growing season to compute his diversion requirements.

I suspect the high historic diversions found by Mr. Stetson and Dr. Mesghinna are higher because of an absence of strict water management. I base this suspicion on the testimony of those at the second Worland hearing. Though I agree again with Dr. Mesghinna that the acceptability of a higher water duty is based upon where the irrigated land is located and what impact such a diversion has upon the remaining water supply, I question allowing repetition of running water through the system and allowing the surplus to drain into a return point merely because it is the easier way to operate. However, neither can I concur wholeheartedly with Mr. Bishop's opinion that a 50% overall efficiency should be required of the Indians.

Floyd Bishop, former Wyoming State Engineer, testified for the State that in his opinion a 50% efficiency rate was achievable. He also stated, however, that requiring a 50% efficiency ratio would hold irrigators using gravity irrigation on historic lands to a higher efficiency than irrigators of the future lands could achieve using sprinkler systems and closed pipes. He named no area in all of Wyoming where a 50% efficiency ratio has been achieved.

Part of Mr. Bishop's experties was based upon his experience as Wyoming's State Engineer. It was his opinion that, in general, efficiencies of farmers on the

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[87] Tribes' Exhibit No. 8, p. 14.

[88] Tr. p. 13797; a maximum rate of diversion of 1 c.f.s per 70 acres over a five-month irrigation season will result.

Reservation today are not very good and that the historic diversion rate is excessive. Under existing circumstances, he feels a lot of water now diverted is wasted.[89] After hearing the testimony at the second Worland hearing, I cannot argue with Mr. Bishop's assertions. Their truth is obvious.

His arrestion that a 50% overall efficiency rate is achievable is most likey valid, but not to be applied in one fell swoop. Mr. Bishop testified that a combination of good management, improvement of the facilities, lining of the canals and improved efficiency of on-farm application of water would be necessary to improve overall irrigation efficiency to 50%.[90] This activity obviously requires the involvement of a time factor. To observe the status quo in Water Division No. 3, and also require a 50% efficiency of Indian irrigators now, where historic efficiencies have averaged 35%, would thus be inequitable. So, after careful consideration of the evidence as noted above, I find that the water duties arrived at by Dr. Mesghinna for the Type VIII lands and by Mr. Higginson for the Indian fee lands are reasonable. I also find that an increase of 5% in the overall irrigation efficiency (to 40%) on the historic lands would not be unreasonable or overly burdensome to the irrigators there, in light of all the evidence. The award of annual diversion set forth below is therefore calculated at a 40% overall efficiency rate, as restated on the following tables which summarize the principal points.

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[89] Tr. pp. 13725 and 13811.

[90] Tr. p. 13810.

ADJUDICATED ANALYSIS

Source	Claimed Acres	Deleted Acres	Awarded Acres	35% Overall Efficiency Claimed Water Duty Acre-Foot/ Acre	40% Overall Efficiency Awarded Water Duty Acre-Foot/ Acre	Claimed Acre-Feet/ Year	Awarded Acre-Feet/ Year
PROJECT LANDS:							
WIND RIVER FEDERAL PROJECT							
Little Wind Unit:							
Ray Canal	347.0	14.9	332.0	5.32	4.65	1,846.0	1,544.0
Coolidge Canal	311.0	186.2	125.0	4.95	4.32	1,539.0	540.0
Sub Agency Canal	—	—	—	—	—	—	—
Subtotal:	658.0	201.1	457.0			3,385.0	2,084.0
Upper Wind Unit:							
Wind River "A" Canal	—	—	—	—	—	—	—
Dinwoody Canal	492.0	47.0	445.0	12.06	10.55	5,934.0	4,695.0
Subtotal:	492.0	47.0	445.0			5,934.0	4,695.0
Johnstown Unit:	—	—	—	—	—	—	—
Lefthand Unit:	20.0	17.0	3.0	6.90	6.03	138.0	18.0
MIDVALE IRRIGATION DISTRICT	—	—	—	—	—	—	—

Source	Claimed Acres	Deleted Acres	Awarded Acres	35% Overall Efficiency Claimed Water Duty Acre-Foot/ Acre	40% Overall Efficiency Awarded Water Duty Acre-Foot/ Acre	Claimed Acre-Feet/ Year	Awarded Acre-Feet/ Year
RIVERTON-LECLAIR DISTRICT	—	—	—	—	—	—	—
PROJECT LANDS SUBTOTAL	1,170.0	265.1	905.0			9,457.0	6,797.0
NON-PROJECT LANDS:							
WIND RIVER BASIN							
East Fork Wind River	259.0	237.3	22.0	5.06	4.42	1,310.0	97.0
Dinwoody Creek	17.0	—	17.0	5.57	4.85	95.0	82.0
Sand Draw	—	—	—	—	—	—	—
Dry Creek	—	—	—	—	—	—	—
Bull Lake Creek	—	—	—	—	—	—	—
Meadow Creek	166.0	—	166.0	5.43	4.75	901.0	789.0
Dry Pasup Creek	1,977.0	521.0	1,456.0	5.31	4.64	10,498.0	6,756.0
Crow Creek	2,927.0	579.4	2,348.0	5.31	4.65	15,542.0	10,918.0
Willow Creek	60.0	2.0	58.0	5.57	4.87	334.0	282.0
Main Stem Wind River	1,338.0	421.9	916.0	5.54	4.85	7,413.0	4,443.0
Subtotal:	6,744.0	1,761.6	4,983.0			36,093.0	23,367.0

LITTLE WIND RIVER BASIN Page 3 of 4							
North Fork Little Wind River	485.0	48.4	437.0	5.49	4.80	2,663.0	2,098.0
South Fork Little Wind River	107.0	—	107.0	4.94	4.32	529.0	462.0
Main Stem Little Wind River	—	—	—	—	—	—	—
Mill Creek	37.0	9.0	28.0	5.57	4.85	206.0	136.0
Sage Creek	207.0	50.1	157.0	5.57	4.85	1,153.0	761.0
Crooked Creek	—	—	—	—	—	—	—
Trout Creek	—	—	—	—	—	—	—
Spring Creek	—	—	—	—	—	—	—
Bighorn Draw	—	—	—	—	—	—	—
Subtotal:	836.0	107.5	729.0			4,551.0	3,457.0
BIGHORN RIVER BASIN							
Main Stem Bighorn River	100.0	72.0	28.0	5.94	5.19	594.0	145.0
Cottonwood Creek	505.0	82.7	422.0	5.89	5.15	2,794.0	2,173.0
Fivemile Creek	156.0	—	156.0	5.57	4.87	869.0	760.0
Muddy Creek	2,901.0	750.7	2,150.0	5.43	4.75	15,752.0	10,213.0
Dry Muddy Creek	—	—	—	—	—	—	—
Maverick Springs Draw	—	—	—	—	—	—	—
Roundup or Warm Springs	—	—	—	—	—	—	—
Subtotal:	3,662.0	905.4	2,757.0*			20,009.0	13,291.0

*3,662 — 905.4 = 2,756.5

Source	Claimed Acres	Deleted Acres	Awarded Acres	35% Overall Efficiency Claimed Water Duty Acre-Foot/ Acre	40% Overall Efficiency Awarded Water Duty Acre-Foot/ Acre	Claimed Acre-Feet/ Year	Awarded Acre-Feet/ Year
POPO AGIE RIVER BASIN							
North Fork Popo Agie River	320.0	48.0	272.0	5.40	4.72	1,728.0	1,284.0
Main Stem Popo Agie River	40.0	8.9	31.0	5.40	4.72	216.0	146.0
Subtotal:	360.0	56.9	303.0			1,944.0	1,430.0
OWL CREEK BASIN							
South Fork Owl Creek	1,620.0	1,002.2	618.0	5.46	4.77	8,845.0	2,948.0
Main Stem Owl Creek	2,265.0	773.7	1,491.0	5.40	4.72	12,231.0	7,038.0
Mud Creek	754.0	144.7	609.0	5.43	4.75	4,094.0	2,893.0
Red Creek	—	—	—	—	—	—	—
Subtotal:	4,639.0	1,920.6	2,718.0			25,170.0	12,879.0
NON-PROJECT LANDS SUBTOTAL	16,241.0	4,752.0	11,490.0**			87,767.0	54,424.0
PROJECT AND NON-PROJECT TOTALS FOR ADJUDICATED	17,411.0	5,017.1	12,395.0			97,224.0	61,221.0

**16,241.0 — 4,752.0 = 11,489.0

UNADJUDICATED IN-USE ANALYSIS

Source	Claimed Acres	Deleted Acres	Awarded Acres	35% Overall Efficiency Claimed Water Duty Acre-Foot/ Acre	40% Overall Efficiency Awarded Water Duty Acre-Foot/ Acre	Claimed Acre-Feet/ Year	Awarded Acre-Feet/ Year
PROJECT LANDS:							
WIND RIVER FEDERAL PROJECT							
Little Wind Unit:							
Ray Canal	7,782.0	668.9	7,113.0	5.32	4.65	41,400.0	33,075.0
Coolidge Canal	6,357.0	1,163.1	5,194.0	4.59	4.32	31,467.0	22,438.0
Sub Agency Canal	2,962.0	492.6	2,469.0	5.26	4.60	15,580.0	11,357.0
Subtotal:	17,101.0	2,324.6	14,776.0			88,447.0	66,870.0
Upper Wind Unit:							
Wind River "A" Canal	1,019.0	134.5	885.0	12.06	10.55	12,289.0	9,337.0
Dinwoody Canal	4,611.0	733.0	3,878.0	12.06	10.55	55,609.0	40,913.0
Subtotal:	5,630.0	867.5	4,763.0			67,898.0	50,250.0
Johnstown Unit:	465.0	38.9	426.0	6.94	6.05	3,227.0	2,577.0
Lefthand Unit:	1,541.0	789.7	751.0	6.90	6.03	10,633.0	4,529.0
MIDVALE IRRIGATION DISTRICT	569.0	8.0	561.0	5.58	4.88	3,175.0	2,738.0

Source	Claimed Acres	Deleted Acres	Awarded Acres	35% Overall Efficiency Claimed Water Duty Acre-Foot/ Acre	40% Overall Efficiency Awarded Water Duty Acre-Foot/ Acre	Claimed Acre-Feet/ Year	Awarded Acre-Feet/ Year
RIVERTON-LECLAIR DISTRICT	1,271.0	295.3	976.0	5.48	4.80	6,965.0	4,685.0
PROJECT LANDS SUBTOTAL	26,577.0	4,324.0	22,253.0			180,345.0	131,649.0
NON-PROJECT LANDS:							
WIND RIVER BASIN							
East Fork Wind River	10.0	—	10.0	5.06	4.42	51.0	44.0
Dinwoody Creek	154.0	36.9	117.0	5.57	4.85	858.0	567.0
Sand Draw	—	—	—	—	—	—	—
Dry Creek	183.0	113.9	69.0	5.54	4.84	1,014.0	334.0
Bull Lake Creek	26.0	—	26.0	5.40	4.72	140.0	123.0
Meadow Creek	179.0	3.5	176.0	5.51	4.82	986.0	848.0
Dry Pasup Creek	56.0	—	56.0	5.20	4.55	291.0	255.0
Crow Creek	36.0	1.7	34.0	5.40	4.72	194.0	160.0
Willow Creek	7.0	6.5	1.0	5.06	4.42	35.0	4.0
Main Stem Wind River	487.0	7.6	479.0	5.77	5.02	2,810.0	2,405.0

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	Subtotal:	1,138.0	170.1	968.0			6,379.0	4,740.0
LITTLE WIND RIVER BASIN								
North Fork Little Wind River		1,776.0	978.7	797.0	5.14	4.49	9,129.0	3,579.0
South Fork Little Wind River		781.0	256.4	525.0	5.11	4.47	3,991.0	2,347.0
Main Stem Little Wind River		386.0	—	386.0	5.94	5.19	2,293.0	2,003.0
Mill Creek		—	—	—	—	—	—	—
Sage Creek		776.0	27.4	749.0	5.51	4.82	4,276.0	3,610.0
Crooked Creek		69.0	—	69.0	5.26	4.60	363.0	317.0
Trout Creek		228.0	—	228.0	5.46	4.77	1,245.0	1,088.0
Spring Creek		178.0	—	178.0	4.97	4.34	885.0	773.0
Bighorn Draw		139.0	—	139.0	4.94	4.32	687.0	600.0
	Subtotal:	4,333.0	1,262.5	3,071.0			22,869.0	14,317.0
BIGHORN RIVER BASIN								
Main Stem Bighorn River		2.0	—	2.0	5.94	5.19	12.0	10.0
Cottonwood Creek		320.0	122.0	198.0	5.89	5.15	1,885.0	1,020.0
Fivemile Creek		362.0	95.3	267.0	5.57	4.85	2,016.0	1,295.0
Muddy Creek		1,194.0	234.7	959.0	5.60	4.90	6,686.0	4,699.0
Dry Muddy Creek		—	—	—	—	—	—	—
Maverick Springs Draw		—	—	—	—	—	—	—
Roundup or								

Source	Claimed Acres	Deleted Acres	Awarded Acres	35% Overall Efficiency Claimed Water Duty Acre-Foot/ Acre	40% Overall Efficiency Awarded Water Duty Acre-Foot/ Acre	Claimed Acre-Feet/ Year	Awarded Acre-Feet/ Year
Warm Springs	———	———	———	———	———	———	———
Subtotal:	1,878.0	452.0	1,426.0			10,599.0	7,024.0
POPO AGIE RIVER BASIN							
North Fork Popo Agie River	112.0	———	112.0	5.43	4.75	608.0	532.0
Main Stem Popo Agie River	74.0	34.3	40.0	5.74	5.02	425.0	201.0
Subtotal:	186.0	34.3	152.0			1,033.0	733.0
OWL CREEK BASIN							
South Fork Owl Creek	84.0	———	84.0	5.51	4.82	463.0	405.0
Main Stem Owl Creek	46.0	———	46.0	5.40	4.72	248.0	217.0
Mud Creek	185.0	55.6	129.0	5.29	4.62	979.0	596.0
Red Creek	———	———	———	———	———	———	———
Subtotal:	315.0	55.6	259.0			1,690.0	1,218.0

NON-PROJECT LANDS SUBTOTAL	7,850.0	1,974.5	5,876.0	42,570.0	28,032.0
PROJECT AND NON-PROJECT TOTALS FOR ADJUDICATED IN-USE	34,427.0	6,298.5	28,129.0	222,915.0	159,681.0

TYPE VII ANALYSIS

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Source	Claimed Acres	Deleted Acres	Awarded Acres	35% Overall Efficiency Claimed Water Duty Acre-Foot/ Acre	40% Overall Efficiency Awarded Water Duty Acre-Foot/ Acre	Claimed Acre-Feet/ Year	Awarded Acre-Feet/ Year
WIND RIVER FEDERAL PROJECT							
Little Wind Unit:							
Ray Canal	1,769.0	514.4	1,255.0	5.32	4.65	9,411.0	5,836.0
Coolidge Canal	1,161.0	233.7	927.0	4.95	4.32	5,747.0	4,005.0
Sub Agency Canal	200.0	16.9	183.0	5.26	4.60	1,052.0	842.0
Subtotal:	3,130.0	765.0	2,365.0			16,210.0	10,683.0
Upper Wind Unit:							
Wind River "A" Canal	99.0	39.6	59.0	12.06	10.55	1,194.0	622.0
Dinwoody Canal	393.0	—	393.0	12.06	10.55	4,738.0	4,146.0
Subtotal:	492.0	39.6	452.0			5,932.0	4,768.0
Johnstown Unit:	189.0	138.0	51.0	6.94	6.05	1,312.0	309.0
Lefthand Unit:	587.0	136.2	451.0	6.90	6.03	4,050.0	2,720.0
MIDVALE IRRIGATION DISTRICT	—	—	—	—	—	—	—

RIVERTON-LECLAIR DISTRICT	100.0	9.6	90.0	5.48	4.80	548.0	432.0
PROJECT LANDS SUBTOTAL	4,498.0	1,088.4	3,410.0***			28,052.0	18,912.0

***4,498.0 – 1,088.4 = 3,409.6

NON-PROJECT LANDS:							
WIND RIVER BASIN							
East Fork Wind River	41.0	41.0	—	5.06	4.42	207.0	—
Dinwoody Creek	—	—	—	—	—	—	—
Sand Draw	—	—	—	—	—	—	—
Dry Creek	4.0	3.5	1.0	5.57	4.85	22.0	5.0
Bull Lake Creek	37.0	—	37.0	5.37	4.67	199.0	173.0
Meadow Creek	160.0	—	160.0	5.09	4.45	814.0	712.0
Dry Pasup Creek	115.0	77.2	38.0	5.06	4.42	581.0	168.0
Crow Creek	154.0	31.1	123.0	5.29	4.62	815.0	568.0
Willow Creek	—	—	—	—	—	—	—
Main Stem Wind River	213.0	—	213.0	5.51	4.82	1,174.0	1,027.0
Subtotal:	724.0	152.8	572.0			3,812.0	2,653.0
LITTLE WIND RIVER BASIN							
North Fork Little Wind River	357.0	159.1	198.0	5.51	4.82	1,795.0	873.0
South Fork Little Wind River	44.0	15.3	29.0	5.09	4.45	224.0	129.0

Source	Claimed Acres	Deleted Acres	Awarded Acres	35% Overall Efficiency Claimed Water Duty Acre-Foot/ Acre	40% Overall Efficiency Awarded Water Duty Acre-Foot/ Acre	Claimed Acre-Feet/ Year	Awarded Acre-Feet/ Year
Main Stem Little Wind River	805.0	95.5	710.0	5.94	5.19	4,782.0	3,685.0
Mill Creek	10.0	9.7	—	5.57	4.85	56.0	—
Sage Creek	822.0	—	822.0	5.57	4.85	4,579.0	3,987.0
Crooked Creek	3.0	2.6	—	5.57	4.85	17.0	—
Trout Creek	63.0	63.0	—	5.11	4.47	322.0	—
Spring Creek	—	—	—	—	—	—	—
Bighorn Draw	—	—	—	—	—	—	—
Subtotal:	2,104.0	345.2	1,759.0			11,775.0	8,755.0
BIGHORN RIVER BASIN							
Main Stem Bighorn River	24.0	—	24.0	5.94	5.19	143.0	125.0
Cottonwood Creek	117.0	47.7	69.0	5.89	5.15	689.0	355.0
Fivemile Creek	—	—	—	—	—	—	—
Muddy Creek	186.0	1.9	184.0	5.63	4.93	1,047.0	907.0
Dry Muddy Creek	—	—	—	—	—	—	—
Maverick Springs Draw	—	—	—	—	—	—	—
Roundup or Warm Springs	—	—	—	—	—	—	—

Subtotal:	327.0	49.6	277.0			1,879.0	1,387.0
POPO AGIE RIVER BASIN							
North Fork Popo Agie River	102.0	14.1	88.0	5.40	4.72	551.0	415.0
Main Stem Popo Agie River	—	—	—	—	—	—	—
Subtotal:	102.0	14.1	88.0			551.0	415.0
OWL CREEK BASIN							
South Fork Owl Creek	64.0	12.9	51.0	5.57	4.85	356.0	247.0
Main Stem Owl Creek	87.0	—	87.0	5.37	4.67	467.0	406.0
Mud Creek	40.0	11.9	28.0	5.37	4.67	215.0	131.0
Red Creek	—	—	—	—	—	—	—
Subtotal:	191.0	24.8	166.0			1,038.0	784.0
NON-PROJECT LANDS SUBTOTAL	3,448.0	586.5	2,862.0****			19,055.0	13,994.0
PROJECT AND NON-PROJECT TOTALS FOR TYPE VII	7,946.0	1,674.9	6,271.0			47,107.0	32,906.0

****3,448 — 586.5 = 2,862.0

TYPE VIII ANALYSIS

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Source	Claimed Acres	Deleted Acres	Awarded Acres	35% Overall Efficiency Claimed Water Duty Acre-Foot/ Acre	40% Overall Efficiency Awarded Water Duty Acre-Foot/ Acre	Claimed Acre-Feet/ Year	Awarded Acre-Feet/ Year
PROJECT LANDS:							
WIND RIVER FEDERAL PROJECT							
Little Wind Unit:							
Ray Canal	28.0	—	28.0	—	—	118.0	118.0
Coolidge Canal	200.0	21.0	179.0	5.01	5.01	1,001.0	897.0
Sub Agency Canal	306.0	—	306.0	—	—	1,531.0	1,531.0
Subtotal:	534.0	21.0	513.0			2,650.0	2,546.0
Upper Wind Unit:	492.0	—	492.0	—	—	2,056.0	2,056.0
Wind River "A" Canal	—	—	—	—	—	—	—
Dinwoody Canal	—	—	—	—	—	—	—
Subtotal:	492.0		492.0			2,056.0	2,056.0
Johnstown Unit:	190.0	—	190.0	—	—	951.0	951.0
Lefthand Unit:	—	—	—	—	—	—	—
MIDVALE IRRIGATION DISTRICT	—	—	—	—	—	—	—

RIVERTON-LECLAIR DISTRICT	—	—	—	—	—	—	—
PROJECT LANDS SUBTOTAL	1,216.0	21.0	1,195.0			5,657.0	5,553.0
OWL CREEK FUTURE PROJECT	245.0	—	245.0	—	—	855.0	855.0
PROJECT AND OWL CREEK FUTURE PROJECT TOTALS FOR TYPE VIII	1,461.0	21.0	1,440.0			6,512.0	6,408.0

INDIAN FEE ANALYSIS

Page 1 of 3

Source	Claimed Acres	Deleted Acres	Awarded Acres	35% Overall Efficiency Claimed Water Duty Acre-Foot/ Acre	40% Overall Efficiency Awarded Water Duty Acre-Foot/ Acre	Claimed Acre-Feet/ Year	Awarded Acre-Feet/ Year
NON-PROJECT LANDS:							
WIND RIVER BASIN							
East Fork Wind River	—	—	—	—	—	—	—
Dinwoody Creek	—	—	—	—	—	—	—
Sand Draw	—	—	—	—	—	—	—
Dry Creek	1,552.0	349.0	1,203.0	various	various	6,705.0	5,245.0
Bull Lake Creek	—	—	—	—	—	—	—
Meadow Creek	178.0	10.0	168.0	various	various	776.0	732.0
Dry Pasup Creek	—	—	—	—	—	—	—
Crow Creek	—	—	—	—	—	—	—
Willow Creek	176.0	41.0	135.0	various	various	767.0	590.0
Main Stem Wind River	5,746.0	2,912.0	2,834.0	various	various	25,588.0	12,967.0
Subtotal:	7,652.0	3,312.0	4,340.0			33,836.0	19,534.0
LITTLE WIND RIVER BASIN							
North Fork Little Wind River	366.0	86.0	280.0	various	various	1,738.0	1,330.0

South Fork Little Wind River	470.0	18.0	452.0	various	various	2,233.0	2,147.0
Main Stem Little Wind River	796.0	272.0	524.0	various	various	3,781.0	2,489.0
Mill Creek	—	—	—	—	—	—	—
Sage Creek	354.0	285.0	69.0	various	various	1,682.0	328.0
Crooked Creek	—	—	—	—	—	—	—
Trout Creek	—	—	—	—	—	—	—
Spring Creek	—	—	—	—	—	—	—
Bighorn Draw	—	—	—	—	—	—	—
Subtotal:	1,986.0	661.0	1,325.0			9,434.0	6,294.0
BIGHORN RIVER BASIN							
Main Stem Bighorn River	—	—	—	—	—	—	—
Cottonwood Creek	—	—	—	—	—	—	—
Fivemile Creek	—	—	—	—	—	—	—
Muddy Creek	—	—	—	—	—	—	—
Dry Muddy Creek	—	—	—	—	—	195.0	—
Maverick Springs Draw	—	—	—	—	—	176.0	—
Roundup or Warm Springs	135.0	100.0	35.0	various	various	249.0	153.0
Subtotal:	135.0	100.0	35.0			620.0	153.0
POPO AGIE RIVER BASIN							
North Fork Popo Agie River	—	—	—	—	—	—	—

Source	Claimed Acres	Deleted Acres	Awarded Acres	35% Overall Efficiency Claimed Water Duty Acre-Foot/ Acre	40% Overall Efficiency Awarded Water Duty Acre-Foot/ Acre	Claimed Acre-Feet/ Year	Awarded Acre-Feet/ Year
Main Stem Popo Agie River	20.0	20.0	—	various	various	95.0	—
Subtotal:	20.0	20.0	—			95.0	—
OWL CREEK BASIN							
South Fork Owl Creek	—	—	—	—	—	—	—
Main Stem Owl Creek	477.0	32.0	445.0	various	various	2,266.0	2,114.0
Mud Creek	—	—	—	—	—	—	—
Red Creek	104.0	104.0	—	various	various	453.0	—
Subtotal:	581.0	136.0	445.0			2,719.0	2,114.0
NON-PROJECT LANDS SUBTOTAL	10,374.0	4,229.0	6,145.0			46,704.0	28,095.0
NON-PROJECT TOTALS FOR INDIAN FEE	10,374.0	4,229.0	6,145.0			46,704.0	28,095.0

RECAPITULATION OF TOTALS FROM PRECEDING TABLES

HISTORIC LANDS CATEGORY	ACRES			ANNUAL DIVERSION	
	NET CLAIMED	DISALLOWED	AWARDED	CLAIMED ACRE-FEET	AWARDED ACRE-FEET
ADJUDICATED	17,411.0	5,017.1	12,395.0	97,224.0	61,221.0
UNADJUDICATED IN-USE	34,427.0	6,298.5	28,129.0	222,915.0	159,681.0
TYPE VII	7,946.0	1,674.9	6,271.0	47,107.0	32,906.0
TYPE VIII	1,461.0	21.0	1,440.0	6,512.0	6,408.0
INDIAN FEE	10,374.0	4,229.0	6,145.0	46,704.0	28,095.0
TOTALS	71,619.0	17,230.5	54,390.0	420,462.0	288,355.0

II. THE DETERMINATION OF PRACTICABLY IRRIGABLE ACRES ON THE RESERVATION'S FUTURE LANDS

A. INTRODUCTION

The United States and the Tribes seek a substantial amount of water in their reserved water rights claim for the irrigation of land not before irrigated, but which is claimed to be practicably irrigable. That claim, labeled for convenience as the "future lands" in this proceeding by the parties, relies on the ruling in *Arizona v. California* for Supreme Court precedence. The Supreme Court concluded in that case, ". . . that the only feasible and fair way by which reserved water for the Reservations can be measured is irrigable acreage."[1] The Court agreed with the Special Master that the reservation of water was intended to satisfy the future needs of the Indians as well as the present needs and granted sufficient water to irrigate future projects constructed on practicably irrigable acreage.[2] The State of Wyoming renewed its position that no reserved right exists, but alternatively maintains the amount of practicably irrigable acreage on the Reservation is significantly less than the amount claimed by the United States.

The procedure used to express quantification has been varied throughout the pleadings and evidence. In its original Statement of Claims, the United States sets out the claims by source of water, arriving at over 88,000 practicably irrigable acres and a claim of 308,000 acre-feet of water per year.[3] Study areas of arable acres were

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[1] *Arizona v. California*, 373 U.S. 546 at 601, 10 L.Ed.2 542 at 578, 83 S.Ct. 1468 (1963).

[2] See also the opening statement of the Boundaries and Dates section, *supra*, for a restatement of this law by Elbert P. Tuttle, Special Master in the subsequent *Arizona v. California* case.

[3] United States' Statement of Claim, pp. 1-2.

further trimmed to 76,027 for the final projects. As evidence was addressed by the several federal experts, acreage and water requirements were further reduced during trial. In their final form they appeared as about 53,760 acres for the five projects, with a total annual diversion requirement of about 210,000 acre-feet.

A majority of the evidence presented sets forth the figures as they are broken down into various study areas created by the experts for the United States as well as certain parcels of land located near Federal irrigation projects and referred to as Type VIII lands. For the sake of consistency, I will discuss the future lands by reference to the study areas.

The Wind River Indian Reservation consists of approximately 2½ million acres[4] and has a variety of geographical features ranging from rocky, near arid conditions, to land quite suitable for sustained crop production. The surface deposits come from the alluvium and sands, gravels and clays from the major rivers and streams.[5] The topography of the Reservation ranges from nearly level terraces to steep mountain slopes and rolling hills.[6] Elevations on the Reservation also vary, ranging from 4,600 feet at Boysen Dam to about 13,800 feet on Gannett Peak. The average elevation of the central low lands is from 5,000 to 6,500 feet.[7] This vast, diverse ecosystem provides the setting for the discussion of practicably irrigable acres.

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[4] Tr. p. 1208.

[5] Tr. p. 760.

[6] United States Exhibit WRIRC-43, p. 1.

[7] United States Exhibit WRIRC-43, p. 2.

B. TEST FOR PRACTICABLY IRRIGABLE ACRES

The Supreme Court in *Arizona v. California* ruled that a reserved right exists for all land which is "practicably irrigable", but offered no test or guidance to help determine what is a practicably irrigable acre, often referred to as a PIA. The term PIA is legal in derivation rather than an engineering concept[8] and has no uniformly accepted definition. In this lawsuit, one definition has been used and agreed upon by counsel for the State, the United States and the Tribes. Practicably irrigable acres are "those acres susceptible to sustained irrigation at reasonable costs".[9] That definition will be the one applied in this Report in determining the quantification of the reserved right.

The test for practicably irrigable acreage requires a two part analysis. First, the land in question must be susceptible to sutained irrigation. That determination is reached only after a consideration of several factors. The United States included soil analysis, drainage investigation, topographical and geological considerations, climate data, water availability determination, cropping patterns, and irrigation system designs in its attempt to establish susceptibility of sustained irrigation. The State, while disagreeing with certain approaches of, or applications made by, the United States, followed a similar approach.

The second part of the analysis requires a determination that the irrigation be accomplished "at reasonable cost." The parties have interpreted this part of the definition to be an economic feasibility criteria and presented substantial economic evidence to support their positions. Virtually no other aspect of this litigation has prompted more debate among the parties and more complex, divergent testimony and evidence than the question of economic feasibility and its benefit-cost ratio and discount rate components.

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[8] Tr. p. 1293; Tr. p. 4351, *et seq.*

[9] Tr. p. 13360.

1. Present Standards

Wyoming raised the question of the appropriate date—not before 1905—from which to measure feasibility, or practicability, of irrigation. My reading of *Arizona v. California* supports the view that evidence of "practicable irrigability" was determined by then current standards. Judge Elbert P. Tuttle, Special Master in the 1982 rehearing, concludes that "the determination of practicable irrigability should be based on present standards. Reference to past standards would introduce an additional complication in an already complex case." [10] I agree and find accordingly.

C. ARABILITY

The United States defined "arable" as those lands which are capable of sustained irrigation [11] or which can "sustain long-term irrigation." [12] The State of Wyoming took exception to this definition, contending that a "tract specific" analysis of relevant economic factors needed to be made at the arability determination stage.[13] Economics is obviously a critical, necessary factor which must be considered in reaching a determination of practicably irrigable acreage. But that analysis is best left for the expert economists to consider and when the second half of the practicably irrigable test is applied. Injecting economics into the arability question, as long as it is covered elsewhere, is an unnecessary duplication of effort. Therefore, I believe the criteria established by the United States is appropriate.

The case for arability presented by the United States relied upon facts and data compiled and collected by its

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[10] Report of Elbert P. Tuttle, Special Master to the Supreme Court in *Arizona v. California*, February 22, 1982, p. 98.

[11] United States Exhibit WRIRC-43, p. 28.

[12] Tr. p. 1295.

[13] Tr. p. 10822.

experts from a variety of sources. Results from previous soil investigations by the Bureau of Indian Affairs, the Bureau of Reclamation (also known as the Water and Power Resources Service), and the Soil Conservation Service were considered, as well as new data compiled by the United States' experts for this litigation.[14]

The State of Wyoming also relied on previous investigations, as well as an analysis of the United States' experts' data and its own investigation.[15] From the materials gathered, the United States reduced the land base of the Reservation still under consideration to approximately 490,000 acres[16] and developed six study areas.[17] Those study areas as defined by the United States were used, as mentioned earlier, as a common point of reference by the State and the Tribes, with the Tribes adding two additional areas for consideration.[18]

The study areas were selected by applying to the Reservation lands five land capability criteria, and a range of limiting factors for each characteristic. They are as follows:

1. Depth to barrier.
2. Water holding capacity.
3. Permeability.
4. Slope.
5. Texture.[19]

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[14] United States Exhibit WRIRC-43, pp. 3-4; Tr. p. 1119.

[15] Tr. p. 10793.

[16] Tr. p. 1123.

[17] United States Exhibit WRIRC-34.

[18] Amended Statement of the Shoshone and Arapahoe Tribes concerning the measurement of Tribal reserved water rights, filed July 20, 1982, p. 1.

[19] United States Exhibit WRIRC-34, p. 7, Table I.

This application did not constitute a detailed study of the areas, but merely served as a screening process to arrive at the study areas. It is not necessary to devote much discussion to this stage of the analysis, since the land excluded (with the exception of Stagner Ridge and Big Horn Flats Extension study areas) is excluded by the parties and the land included is still subject to further reduction by various experts for several rearons. I, therefore, accepted the study areas proposed by the United States, together with the additions of the Tribes, as the land base for the determination of arability.

The next step in determining arability is to adopt a set of land classification specifications and apply them to the study areas to establish the arable land base. The United States proposed six classes into which the lands of the study areas would be divided, with specific standards applicable to each class. The following is a brief discussion of the classes: [20]

> *Class 1*: Class 1 lands are of high quality for irrigation, and will yield high returns with minimum production and management costs.
>
> *Class 2*: Class 2 lands are good quality with only minor deficiencies.
>
> *Class 3*: Class 3 consists of fair quality lands having more serious deficiencies than Class 2 lands.
>
> *Class 4*: Class 4 lands are of marginal quality for irrigation and are used mainly for shallow-rooted crops or pasture.
>
> *Class 5*: Class 5 lands are those lands which have been placed into a deferred status pending further investigation. There were no lands included in a deferred status.

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[20] United States Exhibit WRIRC-43, pp. 8-9; see also Tr. p. 1133.

Class 6: Class 6 lands do not meet the minimum requirements for arability under the land classification standards used.

The State of Wyoming disagreed with the above class definitions, again for the reason that they do not consider economic factors and additionally that they are not specific enough. It must be admitted that the above definitions are general and do not embody a great deal of specifics. But that does not detract from their usefulness as a means of categorizing the relative merits of the lands. Furthermore, specific criteria were applied by the United States to the lands when the classifications were made. Separating lands into classes is at best a subjective undertaking, one which will always raise the possibility of disagreement among experts in the field of land classification, which does not profess to be an exact science. The classifications above provide a sufficient means whereby lands with similar characteristics can be segregated into the same class with a reasonable degree of consistency and objectivity.

The process of assigning a classification to a tract of land requires the application of a variety of standards and criteria and the expertise from a diversity of disciplines. Factors considered by the United States include soil texture, depth, moisture retention, alkalinity, salinity, surface gravel and cobble, slope, irrigation pattern and field size, level of the surface, surface cover, drainage, hydraulic conductivity and soil depth to barrier.[21] The final determination relied on input from agricultural engineers, a land classifier, a soil scientist and a drainage engineer.[22]

The State again contended that the standards adopted and criteria applied were too general and ambiguous to form a basis from which an objective evaluation could be

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[21] United States Exhibit WRIRC-43, Table II, pp. 10-12.

[22] Tr. p. 1127.

made of the lands. Phrases such as "relatively free," slightly irregular," and "slight drainage problem," were argued to be incapable of precise scientific determination. While it is difficult to disagree with the intent of the State's position, it is equally difficult to believe that the argument raises any substantive doubt about the standards used and the applications made by the United States in reaching its arability determination. The history of irrigation projects in the West has numerous examples of classification standards designed for specific projects which vary in degree of intensity and approach of definitions. The argument over the wording of the definitions is a semantic one as long as there is an assurance that a good, professional job was done in the field when the lands were physically analyzed and grouped into the six classes.

When the discussion turns to the actual classification field work, it raises the issue argued several times during the hearings of what expertise is required and how much work is sufficient to conclude that a competent job has been done. The United States relied on land classifiers who had collectively more than 96 years of experience in the field.[23] Drillings and tests included augering and logging 197 borings between 5 and 10 feet, and 357 borings of 5 feet or less; digging 9 backhoe pits; drilling and logging 117 deep holes; analyzing samples from 165 holes for soil chemistry; and running 11 infiltration and 22 hydraulic conductivity tests.[24] Additionally, information collected during the 1961 Bureau of Reclamation Study was used.

Experts for the State of Wyoming testified that the work done by the United States was not sufficient to reach the conclusions made. They contended that the complexity of the soils which compromise the Reservation

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[23] Tr. pp. 1154-1155.

[24] United States Exhibit WRIRC-34, p. 16.

require a more extensive study, with more backhoe pits and more holes.[25] The absence of logged holes for 8,909 acres of gravity land and 11,143 acres of sprinkler land was argued as showing that the study was incomplete.[26] The State placed a tremendous importance throughout the cross-examination of the experts for the United States, as well as in its case in chief, on the fact that certain lands were classified where no hole was drilled or was not at least six feet in depth. The conclusion sought by this argument is that the land could therefore not be classified given the absence of a hole drilled to an appropriate depth.

No one would argue that the optimal land classification effort would be one where each and every plot, parcel, field and tract of land had a thorough chemical analysis of the soil, several borings, deep holes and at least one backhoe pit. Thousands of hours and vast amounts of resources could be spent on such an undertaking. Even with that degree of effort, there still could be the possibility that some good land would be overlooked or that some questionable land might be included. What is involved is an area of engineering that is not an exast science and which depends on the application of experience and expertise by the classifier in the field to the given situation. The test of a land classification study must not be so minute and demanding as to exceed all realms of reasonableness.

It is possible that some error may exist in the results produced by the United States. Error is probably inevitable whenever a group of people are required to coordinate and analyze such a complex matter and must rely on a field of expertise which, by its nature, lacks the certainty of complete objectivity. But that concern can be addressed by an appropriate percentage reduction in the totals to

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[25] Tr. p. 10625.

[26] Tr. p. 10935.

reflect the unavoidable errors that arise in such a study. Ten or fifteen percent would be an appropriate reduction figure to use given the complexity of the Reservation lands, the understandable limitations on time and resources available in the classification, and the state of the art of land classification.

The above is not to say that I believe the approach of the United States was incorrect or incomplete. The United States met its burden of proof in establishing the land base for the determination of arability. The State of Wyoming, while certainly raising some concerns sufficient to support a percentage reduction, did not establish a case sufficient to refute the case of the United States. It is not a prerequisite, as the State might argue, in establishing a land classification, that each and every tittle of land have a batch of borings and testings. Therefore, it is my conclusion that the preponderance of the evidence favors the arable land base proposed by the United States, with a reasonable percentage reduction to compensate for error and inaccuracy. That percentage reduction of ten to fifteen percent will be considered more carefully in the next section.

The following describes the arable lands by study area and includes a breakdown of number of acres of gravity lands, additional sprinkler lands and total arable lands: [27]

(a) North Crowheart Area

The North Crowheart Area lies north of the Wind River. Arable land is predominantly in the terrace lands paralleling Crow, Dry, Fivemile, Muddy, and Cottonwood Creeks. Surface soils of these areas are either terrace or alluvial fan material. The subsoils are mostly residual.

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[27] United States Exhibit WRIRC-43, pp. 22-25; Table 8 was used as a reference exhibit in preparing the table. Gravity lands are capable of sprinkler irrigation. Additional sprinkler lands, due to slope, will not support gravity irrigation.

Gravity lands	41,985 Acres
Additional Sprinkler lands	1,105 Acres
Total Arable Lands	43,089 Acres

(b) South Crowheart Area

Lands of the South Crowheart Area are along the south side of Wind River and extend to near the confluence of Little Wind River. The core of the South Crowheart Area is an elevated terrace bench at the eastern end, where the land is gently sloping to nearly flat. Near the margins of the bench are some irregularities in slope. Soils are loams and clay loams overyling gravels. The top 12 inches of these gravels is usually in a loam or sandy loam matrix, and loose gravel is seldom encountered within 3 feet of the surface. Arable areas are small and scattered. Arable soils in this project area are generally light in texture and free of salt or sodium, and bedrock is seldom deeper than 10 feet from the surface.

Gravity lands	5,425 Acres
Additional Sprinkler lands	1,762 Acres
Total Arable Lands	7,187 Acres

(c) Big Horn Flats Area

Big Horn Flats is a series of elevated terrace benches some 17 miles in length with a maximum width of about 3 miles, lying south of and roughly parallel to the Wind River near the base of the western part of the basin. This area is a terrace remnant sloping from 6300 feet in elevation at the western end to 5800 at the eastern end. Topography is acceptable for either gravity or sprinkler irrigation. Soils are of terrace origin and overlie loose gravel at some depth. Gravel and cobble are common in a loam or clay loam matrix. Much of the bench land was limited to Class 2 and Class 3 because of the reduced water-holding capacity of the soil caused by the effect of large quantities of gravel. Backhoe pits in the area revealed roots to a depth of 60 inches showing that the gravel was not a restriction to roots or plant growth.

Gravity lands	13,677 Acres
Additional Sprinkler lands	4,004 Acres
Total Arable Lands	17,681 Acres

(d) Riverton East Area

Approximately two-thirds of the arable lands in the Riverton East project lie on low terraces of the Wind River. The land surface is smooth and favorable for irrigation. Soils of the terraces are underlain by gravel and sand. Approximately one-third of the arable areas lying on the lower ridges and slopes of the residual upland have light-textured soils and grades of 1 to 4 percent.

Gravity lands	2,902 Acres
Additional Sprinkler lands	1,321 Acres
Total Arable Lands	4,223 Acres

(e) Owl Creek Area

The Owl Creek Area is located along the northern boundary of the Reservation and includes the Arapahoe Ranch purchased by the Arapahoe Tribe. Arable lands are scattered and located on intermixed remnants of old gravel terraces and residual soils. South of Oil Creek, the gravel terraces containing arable lands have small, irregular fields that are too steep and undulating for gravity irrigation, though suitable for sprinkler application. The residual soils have a clay topsoil with a medium textured subsoil.

Gravity lands	0 Acres
Additional Sprinkler lands	233 Acres
Total Arable Lands	233 Acres

(f) Arapahoe Area

This area occupies land lying between the Little Wind and Popo Agie River. The main body of arable land is a terrace bench in the confluence area between the two

streams. Soils on this bench overlie bravels of varying depths.

Gravity lands	2,086 Acres
Additional Sprinkler lands	1,528 Acres
Total Arable Lands	3,614 Acres

2. Summary of Acreage Totals After Arability Test

In summary, the future areas proposed by the United States were as follows:

Project	Lands		Total Acres
	Gravity	Additional Sprinkler	
North Crowheart	41,985	1,105	43,089
South Crowheart	5,425	1,762	7,187
Big Horn Flats	13,677	4,004	17,681
Riverton East	2,902	1,321	4,223
Owl Creek	0	233	233
Arapahoe	2,086	1,528	3,614
Total	66,075	9,953	76,027

D. ENGINEERING FEASIBILITY

The next factor in the irrigability equation is the determination of the feasibility of the proposed projects from an engineering viewpoint. This aspect of the proceedings included several weeks of hearings and numerous witnesses for all major parties.

The United States, through the testimony of Dr. Mesghinna of Stetson Engineers, presented its case for the design of irrigation facilities to serve the future lands projects, the costs involved and irrigation requirements. The Tribes, while relying on and adopting in part the testimony of the United States, offered its own witnesses from Keller Engineers, advocating additional acreage labelled Stagner Ridge and Big Horn Flats Extension. The State of Wyoming with testimony from Banner and

Associates, sought to show the infeasibility of the United States' and Tribes' proposals and argued for a reduced finding of irrigable acreage.

1. The 11 Point Analysis

The engineering feasibility determination requires consideration of several factors and the application of data from a variety of sources. The testimony by Dr. Mesghinna on these factors demonstrates a thorough, professional presentation of the subject and provides an excellent basis for discussion.[28] He identified eleven factors to consider in arriving at the engineering feasibility determination. They are as follows:

1. Climate
2. Crops
3. Evapotranspiration
4. On-farm system design
5. Pipe Network design
6. Pumps and pumping plants
7. Canals and related structures
8. Subsurface and maintenance
9. Operation and maintenance
10. Water duty
11. Total costs

While disagreement exists between the experts as to final conclusions or particular aspects of the analysis of each of the eleven points, most of the testimony presented regarding engineering feasibility was presented by an approach similar to the eleven point approach of Dr. Mesghinna.

The importance of climate cannot be underestimated in determining engineering feasibilty because of its significant impact on cropping patterns and, therefore, all other aspects of a feasibility analysis.

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[28] In general, see United States Exhibit WRIRC-245; Tr. p. 4000, *et seq.*

(a) Climate Zones

The United States, using the criteria of elevation, area distribution, and other agency studies in the area, selected seven weather stations on or near the Reservation to compile the climate data.[29] From the information gathered, Mesghinna proposed seven climate zones: Diversion Dam; Fort Washakie; Pavillion; Burris; Riverton; DuBois, and Lander.[30] Those zones, together with the respective data for each, were then used for input on selection of crops and cropping patterns.

While the Tribes did not contest the development of the climatological data, the State of Wyoming questioned its reliability, contending it was gathered from only seven locations and therefore, was not sufficiently accurate for use over the entire Reservation. As I stated in my arability discussion, an optimum approach can be envisioned for any aspect of an analysis which, when compared to the study actually done, makes the effort appear far from complete. Climate data gathering stations could have been set up in hundreds of locations on the Reservation to get a better sampling of the variance in climate from one study area to another. Particularly detailed measurements of solar radiation could have consumed thousands of hours of work. Even with that effort, the data could be criticized for not representing the average or norm for the area for a given cycle of years. This entire adjudication could have been delayed for ten years while a complete study was done for a ten year cycle.

Obviously, it is unfair to require such an unrealistic test when there is no evidence, and only speculation, that the data used by Dr. Mesghinna was unreliable or that any greater effort would produce different results. Reason and common sense, together with the inevitable restrictions of time and budget, dictate that something less than

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[29] Tr. pp. 4026-35.

[30] United States Exhibit WRIRC-244.

perfection should warrant the conclusion that an adequate, professional job has been done in compiling data reliable enough to use with reasonable certainty. The testimony of and the effort made by Dr. Mesghinna in compiling the climatological data satisfies any burden of the United States to prove the climate base for the engineering feasibility analysis. The State does not shift the burden back merely by asserting that greater efforts could have been made in the data collection.

(b) Cropping Patterns

The next step is the selection of crops and cropping patterns for the study areas. Dr. Mesghinna considered sereval factors in his selection of the crops and patterns, including climate conditions, soil characteristics, water availability, market factors, ease of transportation and demand for the products.[31] Together with assistance for economic considerations and farmer interviews to determine actual preferences, alfalfa, corn, small grain nursing alfalfa and small grain were selected as the crops to be grown in the future projects. Dr. Mesghinna then developed cropping patterns using the selected crops, one for areas less than 5,900 feet in elevation and one for elevations of greater than 5,900 feet.[32] The lower elevation pattern consists of sixty-seven percent (67%) alfalfa, twelve percent (12%) corn, sixteen percent (16%) small grain nursing alfalfa, and five percent (5%) small grain.[33] The higher elevation pattern consist of sixty-seven (67%) alfalfa, sixteen percent (16%) small grain nursing alfalfa and seventeen percent (17%) small grain.

The cropping patterns selected by the United States drew relatively little reaction from other parties. The State of Wyoming contended that a different pattern

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[31] United States Exhibit WRIRC-245, Tr. pp. 4045-57.

[32] United States Exhibit WRIRC-245, Tr. p. 4063.

[33] Tr. p. 4063.

could contribute to a higher overall efficiency and thereby reduce the diversion requirements. While that may be true, and without commenting on the merits of the suggestion, the patterns proposed by the United States nevertheless are realistic and do not demonstrate any significant deviation from an historically typical Wyoming farming pattern. I therefore find that the cropping patterns proposed by the United States are reasonable for use in the feasibility analysis.

(c) Evapotranspiration

The next consideration is the very complex, technical determination of the water required for the growth of the selected crops. This requires determination of "evapotranspiration", defined as the amount of water evaporated from the soil and from the plant foliage and transpirated from the plant itself.[34] First, the potential evapotranspiration of a reference crop is determined by formula. Then that result is used to calculate the evapotranspiration for the cropping patterns by multiplying the potential evapotranspiration figure by the "crop coefficient" for the crops. That result, calculated for each climatic zone for each month of the growing season, determines that amount of water necessary to meet the evapotranspiration requirements. Subtracting from that the effective precipitation that can be expected to satisfy part of the water needs leaves the net irrigation requirement, which is then applied to the cropping patterns for the two elevations.

It is unncessary to discuss at length the various calculations and procedures outlined above and used by Dr. Mesghinna in reaching his net irrigation requirement. While there were minor differences in opinions from other experts, and questions as to how these results might apply in the ultimate determination of diversion requirements, no one directly confronted the approach or find-

[34] Tr. p. 4066; see also United States Exhibit WRIRC-245, pp. 2-5.

ings. Mr. Bishop, as a witness for the State of Wyoming, testified that he personally would have used the Blaney-Criddle equation for calculating potential exapotranspiration rather than the Jensen-Haise formula used by Dr. Mesghinna. He admitted the decision was due in part to his familiarity with that approach, and further stated the "one isn't necessarily better than the other." [35] I find no evidence or testimony to satisfactorily rebut the testimony of and procedures used by Mesghinna in reaching his net irrigation requirement determination, and I therefore find his approach and conclusions reasonable.

The next several steps in Dr. Mesghinna's analysis cause the most disagreement between the parties and produces a significant divergence of expert opinion. Once he determined the net irrigation requirement, he designed the on-farm system and then the conveyance system to service the project. His designs and related cost estimates were the catalyst for opposing testimony from virtually every other witness on the subject.

It should be noted at the outset, before examining the merits of the respective positions, that Dr. Mesghinna's designs received relatively warm praise from his colleagues for their engineering feasibility. Mr. Bliesner and Dr. Keller testified respectively that the designs were "workable" and that the technology was "very, very common." [36] Mr. Bishop testified the designs were reasonably good and "The methods used were all right, in my view, and supportable." [37]

(d) On-Farm System Design, Drainage and Remaining Points

Dr. Mesghinna developed costs and designs for the on-farm system, the pipe network, pumps and pumping plants, canals and related structures, drainage, and op-

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[35] Tr. p. 12163.

[36] Tr. p. 8355; Tr. p. 8788.

[37] Tr. p. 12157.

eration and maintenance. He gave a very detailed, professional discussion and analysis of the factors involved as well as the process used in determining all the required components.[38] He admitted during his testimony in several instances that he generally took a rather conservative approach to the costing and design decisions, relying on personal experience and knowledge of the potential for cost overruns and unforeseeable problems as a basis for his professional opinion.

The Tribes contend that while Dr. Mesghinna's plan was workable, it was, as testified to by Mr. Bliesner, "more expensive than necessary to accomplish the job that needed to be done."[39] Keller Engineering examined five major areas of the plan and determined with the use of alternate design features, lower unit costs, lower operating pressures, and life cycle optimizing techniques, "the investment and operating costs can be significantly reduced."[40] Specific details were given for each area of evaluation.

(e) Difference in Costing Methods

Keller Engineers testified that the pipeline costs could be reduced by as much as twenty-three percent (23%), but for a conservative estimated, they used fifteen (15%). This result was a product of the use of a computerized pipe network optimization program utilizing a technique developed by Dr. Keller. The program determines "the most economic system possible."[41] It also is based on lower installed material costs attributable to volume discounts allowed on large quantity purchases.

The on-farm costs and the energy costs were also reduced by the respective figures of eight percent (8%)

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[38] United States Exhibit WRIRC-245; Tr. p. 4106-4276.

[39] Tr. p. 8355.

[40] Tribes' Exhibit 13, p. 24.

[41] Tribes' Exhibit 13, p. 9.

and ten percent (10%). The on-farm reduction is again based on lower costs from large volume purchases. The energy costs were reduced by using sprinkler operating pressures ranging from 40 to 48 psi as opposed to the 55 psi figure used by Dr. Mesghinna. The trend toward improved low pressure sprinkler performance was the basis for this reduction.

The pumping plant design was next criticized as being too sophisticated and elaborate for the planned need. A computer program was used here also to design cost effective pumping plants which would rely on centrifugal pumps when possible, manual rather than automatic operation, and less elaborate enclosures and related construction. Mr. Bliesner based his reductions in part on personal experience that buildings enclosing the pumping plants would not be necessary. This experience was obtained at the Superior Farming Company in California.[42] This resulted in reductions of as high as sixty percent (60%).

The drainage system design proposed by Dr. Mesghinna was claimed to be more intensive than necessary and therefore excessively expensive. Keller Engineers contend that the natural drainage capacity of the lands in the future projects was underestimated and not given sufficient weight in the drainage system design. Dr. Mesghinna's use of the admitted normal design procedure of removing all the water added during the irrigation season was labelled "the most conservative point" in his design and unnecessary for the Wind River Indian Reservation."[43] Keller Engineers' redesign of the drainage achieved approximately a twenty-seven percent (27%) reduction of Dr. Mesghinna's costs.

Dr. Mesghinna used twenty-five (25%) of all but on-farm costs for his engineering and contingency cost.

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[42] Tr. p. 8371.

[43] Tribes' Exhibit 13, p. 31.

Keller Engineers selected twenty percent (20%), attributing ten persent (10%) each to engineering and contingencies. The actual difference after all the computations are made is relatively small.

The greatest single criticism made by experts for the State of Wyoming against Dr. Mesghinna's design was the lack of sufficient detail to determine the elements of the design and the associated costs.[44] In general, Mr. Bishop indicated that he did not have any great problem with the overall design, and he agreed more often than not with each aspect of the plan.

Mr. Sostrom of Banner Associates, Inc. prepared and testified to costs that were developed as an estimate for the State of Wyoming of the proposed future irrigation projects.[45] Relying in part on facts and data used by Dr. Mesghinna, and developing others on his own, Mr. Sostrom reached a conclusion of per acre capital construction costs which were consistently greater than those of Dr. Mesghinna. The most apparent area of disagreement, and nearly the single reason for the disparity between the two conclusions, was the selection by Banner Associates, Inc. of thirty-five percent (35%) as the appropriate cost for engineering and contingencies.[46] The Mesghinna engineering and contingency cost figure was a constant and well defended twenty-five percent (25%).

Another factor responsible for a higher cost total is the inclusion by Mr. Sostrom of an eight percent (8%) item for mobilization. He defined mobilization costs as the "cost that is commonly used to pay for the mobilizing of the materials, the equipment, the personnel, the supervisory personnel, the on-site equipment—or the on-site office space, all of the different pieces of work that a

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[44] Tr. p. 12164.

[45] Plaintiff's Exhibit WRIR F50-4A.

[46] Tr. p. 12169; Tr. p. 13353.

contractor must have available, and moving them to the job site." [47] Mr. Sostrom claimed that these costs associated with project construction were not included in the estimates of the United States.

The United States, the State of Wyoming and the Tribes all reached conclusions on the development investments costs for the future projects. Their totals, expressed in dollars per acre, are as follows:

	United States [48]	Tribes [49]	State of Wyoming [50]
North Crowheart	1,837	1,430	2,333
South Crowheart	2,033	1,622	2,509
Arapahoe	2,030	1,673	2,683
Riverton East	2,006	1,510	2,307
Big Horn Flats	2,067	1,444	2,000

It is not an easy task to assign a development cost to a given project when experts in the field cannot agree on what is an accurate estimate. While I respect the experience, education and expertise of those witnesses testifying on this matter, I conclude that the conclusions presented by the United States, with the qualifications set out below, are reasonable and realistic and are the figures I adopt in determining the feasibility of the future projects. A brief discussion follows explaining my conclusion.

The experts who appeared on behalf of the State of Wyoming and the Tribes gave a partial impression that they were advocates of positions favorable to their clients rather than experts doing an independent, unbiased analysis of the feasibility of constructing irrigation projects.

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[47] Tr. p. 13353.

[48] United States Exhibit WRIRC-245, p. 42.

[49] Tribes' Exhibit 13, p. 35.

[50] Plaintiff's Exhibit WRIR F50-4.

This is not a condemnation of their work or opinions and it is understandable how a certain degree of advocacy could develop during such lengthy and important proceedings. It is, however, significant enough to warrant the conclusion that the preponderance of the evidence supports the position of the United States.

Furthermore, the thorough approach of Dr. Mesghinna, whose testimony exhibited an independence detached from any preconceived estimates of what should be the result, satisfied the burden of proof and constituted the best evidence of what is a reasonable conclusion on engineering feasibility. He examined every aspect of his task carefully and applied accepted engineering concepts to each decision. In particular, I find the preponderance of the evidence supports the design system testified to by Dr. Mesghinna, the twenty-five percent (25%) engineering and contingency cost factor, and the drainage system proposed. The evidence presented and the history of western irrigation practices demonstrates the need for greater cost factors and proposed drainage than what was provided for by Keller Engineers. But I cannot throw off my conclusion that Banner Associates, Inc. overstated the cost overrun potential in their thirty-five percent (35%) factor for engineering and contingencies. Dr. Mesghinna was cautious in estimating the likely expenses to be incurred and yet he did not inflate them beyond a point of reasonable estimation.

As stated above, there is one qualification to the adoption of the United States' system design. Earlier in this Report, I concluded that the arable land base adopted from the United States must be reduced by a reasonable percentage—10% to 15%—to compensate for error and inaccuracy.[51] That percentage reduction must carry through, for consistency, in the analysis of engineering feasibility. I find that Dr. Mesghinna compensated for

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[51] See pages 149 and 150 of this Report.

that problem in part by decreasing his acreage totals five percent (5%) for lands that may be used for farmsteads or roads.[52] Therefore, his acreage totals must be reduced by only an additional ten percent (10%) to compensate for error and inaccuracy resulting from his use of the HKM arable land base.

I conclude that the following is the acreage totals for the future lands which satisfy the engineering feasibility determination:

Project	Net Acreage
North Crowheart	34,993
South Crowheart	4,238
Arapahoe	3,437
Riverton East	3,442
Big Horn Flats	2,410
TOTAL ACREAGE:	48,520

E. DIVERSION REQUIREMENTS

Having determined the net acreage, there remains the need to determine the diversion requirements necessary to service the acreage and final economic tests. Once again, the parties disagree as to what is the appropriate diversion requirement.

Dr. Mesghinna calculated the diversion requirement for each of the future projects by considering the amount of water needed for crop growth and the efficiencies of application, distribution and conveyance. He made his determination on a monthly basis and tailored the calculations to fit the requirements of the climatic zones associated with each project. Within each of the efficiency determinations, he considered several factors, including average wind velocity, water holding capacity, cropping patterns, root depths, type of delivery and conveyance systems planned, source of water, conveyance distance,

[52] Tr. p. 4290.

amount and velocity of water in the canals, and management techniques. Applying these factors, he determined the total diversion requirement, unit diversion, and source of water for each future project. His conclusions are as follows: [53]

1. United States' Assertions by Project

North Crowheart:	
Unit diversion:	3.81 acre-feet/acre/year
Total diversion:	147,767 acre-feet/year
Source:	Wind River
South Crowheart:	
Unit diversion:	4.29 acre-feet/acre/year
Total diversion:	20,137 acre-feet/year
Source:	Wind River
Arapahoe:	
Unit diversion:	4.39 acre-feet/acre/year
Total diversion:	16,720 acre-feet/year
Source:	North Fork Popo Agie
Riverton East:	
Unit diversion:	4.60 acre-feet/acre/year
Total diversion:	17,536 acre-feet/year
Source:	17,040 acre-feet/year from the Big Wind River; and 496 acre-feet/year from Little Wind River
Big Horn Flats:	
Unit diversion:	2.70 acre-feet/acre/year
Total diversion:	7,212 acre-feet/year
Source:	4,748 acre-feet/year from the Big Wind River; and 2,464 acre-feet/year from Little Wind River
TOTAL DIVERSION REQUIREMENT:	209,372 acre-feet

2. Overall Efficiency Percentage

The State of Wyoming contested the diversion requirement of Dr. Mesghinna, claiming it should be 108,424.3 acre feet.[54] In addition to reasons discussed earlier, the

[53] United States Exhibit WRIRC-245.

[54] Plaintiff's Exhibit WRIR FFB-3.

State contended an overall efficiency of fifty percent (50%) should be used in calculating the annual diversion.[55] Mr. Bishop, relying on his years of experience, stated "a close management and husbandry of the water resource will prc ide a 50 percent overall efficiency in projects of this kind."[56] Banner Associates, Inc. reviewed the United States' reports and did not conduct a completely independent analysis of the future lands. Mr. Bishop admitted that his overall efficiency estimate did not have the components of application, distribution or conveyance efficiency.

I find the United States' claim for unit diversion and total diversion to be reasonable and supported by the preponderance of the evidence. The average water duty testified to by Dr. Mesghinna of 3.9 acre-feet per acre[57] is more restrictive than the 1 cfs per 70 acres allowed holders of certificates of appropriation by Wyoming statute.[58] Dr. Mesghinna testified that his water duty "is quite low as compared to what is going out right now" in other areas around the Reservation.[59]

Numerous witnesses who testified at the December 1981 hearings in Worland substantiated Dr. Mesghinna's estimates of current diversions and presented testimony

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[55] The agreed formula for this determination is:

$$\frac{\text{Net Irrigation Requirement}}{\text{[divided by] Overall Efficiency}} = \text{Annual Diversion Requirement}$$

Thus the higher the efficiency, the lower the annual diversion.

[56] Tr. p. 12168. See also the Bishop discussion under the Historic Lands section, *supra*.

[57] Tr. p. 4326.

[58] W.S. 41-4-317 (1977).

[59] Tr. p. 4327.

of present water use significantly greater than the United States' claim. Mr. Ballenger of the Cody Canal Irrigation District testified to use of water twice as great as the basic state allowance and stated, "You just couldn't get your field irrigated with a foot of water per 70 acres with your flood irrigation." [60] Mrs. Bales on cross-examination testified that she and her husband could not continue their operation without supplementary water in excess of the basic statutory allowance.[61] Mr. Davis, a farmer from Emblem, Wyoming, testified that if he were required to use no more than 1 cfs per 70 acres in his farming operation, he "would be looking for a gullible buyer with a little money, but I think I would want out of it real quick and real bad." [62]

It would be unreasonable and inequitable to impose a duty on the Indians which is far in excess of what is currently expected of other water users in Water Division No. 3. I agree with the observation of Mr. Bishop that the time has arrived to initiate better management of our water resources and to utilize technologoy which will increase efficiency. I believe the United States' approach embraces that position and incorporates in the proposed irrigation development plan management and construction techniques and technological methods which surpass the typical farming operation in Wyoming. Justice does not allow a denial of the claims for the Wind River Reservation on the basis that their proposal does not achieve the greatest possible efficiency using the most current techonogical and agricultural advances. This is particularly true when the record contains so many examples and admissions of current uses by other individuals which border on sheer waste when tested by the standards advocated by the State of Wyoming. Therefore, subject to

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[60] Tr. pp. 14149W and 14155W.

[61] Tr. p. 14188W.

[62] Tr. p. 14046W.

the cut below, I adopt the unit diversion requirements advanced by the United States.

The total diversion requirement advanced by the United States must still be reduced by the ten percent (10%) factor for error and inaccuracy from the arable land base, as discussed earlier. Using the unit diversion figures of Dr. Mesghinna, and applying them to the acreage totals concluded above, the total diversion requirements for the future lands are as follows.

2. Summary of Acreage Totals After Engineering Test

Project	Net Acreage	Unit Diversion (acre-feet/acre)	Total Diversion (acre-feet/year)
North Crowheart	34,993	3.81	133,324
South Crowheart	4,238	4.29	18,181
Arapahoe	3,437	4.39	15,088
Riverton East	3,442	4.60	15,837
Big Horn Flats	2,410	2.70	6,507
TOTAL	48,520		188,937

I discuss the additional claim of the Tribes for Stagner Ridge and Big Horn Flats Extension future lands after the following economic feasibility discussion.

F. ECONOMIC FEASIBILITY

The last aspect of the practicably irrigable acreage test to be considered is whether the contemplated future lands can be irrigated "at a reasonable cost." No other aspect of this litigation produced more complex subject matter and testimony nor more divergence in respective positions than this question of economic feasibility. The United States presented an economic feasibility analysis which produced a benefit-cost ratio determination. The Tribes maintained two positions. First, they responded to the conclusions of the United States. Second, they contended, as discussed earlier, that economic feasibility was only one method to determine practicably irrigable acreage, another method being whether the lands in question are similar to other lands and projects actually in

operation which have sustained long-term irrigation. The State of Wyoming followed the benefit-cost ratio approach, reaching substantially different conclusions from those of the United States.

The expert for the United States who testified concerning his economic feasibility analysis was David Dornbusch of David M. Dornbusch & Company, Inc. His approach, as detailed in his report[63] and testimony, established a format for analysis which was followed by the other experts. I will follow that format also for the purposes of this discussion.

1. Evaluation of Crop Yields

Mr. Dornbusch considered elevation an important factor affecting his analysis, particularly as it affects crop yields. He concluded at the outset that the Reservation should be divided into two categories; "highland" areas, being lands with an elevation of 5900 feet or greater, and "lowland" areas, being lands lower than 5900 feet. His opinion was based on a Bureau of Indian Affairs Completion Report, Agricultural Extension Service personnel, personal expertise, and interviews with farmers in the area.[64] The State of Wyoming contested this, and its economists testified that 5500 feet would be a more appropriate dividing elevation.[65] I find the evidence and testimony of the United States to be more persuasive and conclude that the preponderance of the evidence supports a difference in estimated crop yields between those lands above 5900 feet and those lands below 5900 feet.

(a) Patterns

Having made the initial distinction on elevation, Mr. Dornbusch then established cropping patterns for his

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[63] United States Exhibit WRIRC-268.

[64] United States Exhibit WRIRC-268; Tr. pp. 4948-4949.

[65] Plaintiff's Exhibit WRIR EJ-2; Tr. p. 14722.

economic analysis. Based upon extension service reports, personal expertise, interviews with area farmers and "interviews with other knowledgeable people on or near the Reservation," [66] he established the following:

Crop	Lowland Percent Distribution	Highland Percent Distribution [67]
Malting Barley	5	17
Nurse Malt Barley	16	16
Alfalfa	67	67
Corn Silage	5	—
Corn Grain	7	—

Economists for the State of Wyoming were in substantial agreement with the above cropping patterns. However, they proposed the planting of dry beans instead of corn and corn silage, and used slightly different proportions of alfalfa.[68] Dr. Jacobs based the changes on personal experience and observation.

I find the cropping patterns proposed by Mr. Dornbusch reasonable and acceptable and are supported by a preponderance of the evidence. The difference between the relative positions is minimal and testimony and evidence presented of historic cropping patterns clearly supports the use of corn silage and grain as well as the percent allocation on alfalfa. Mr. Dornbusch placed only a minimal weight on corn in the lowlands and eliminated it completely on the highlands. That use of corn in a cropping pattern is clearly supported by a preponderance of the evidence.

The next factor, crop yields, produced substantive disagreement among the experts. Mr. Dornbusch for the

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[66] Tr. p. 4942.

[67] United States Exhibit WRIRC-268, Table 3, p. 11.

[68] Tr. pp. 14179-14720; Plaintiff's Exhibit WRIR EJ-8.

United States projected yields and prices for the future projects based on a study done of the Midvale Irrigation District by Doug Agee, interviews with farmers in the area, and interviews with agricultural extension personnel, as well as application of his own experience and research.[69] Inherent in his conclusions, and a reason for greater malt barley yield projections, were adjustments made to account for qualitative differences between the proposed project lands and the Midvale Irrigation District lands and differences in the respective methods of irrigation and management. His yield and price conclusions, as they appear in United States Exhibit WRIRC-268, Table 1, page 4, are as follows:

Crop	Units	Annual Yield Per Acre Lowland	Highland	Price Per Unit Dollars
Malt Barley	Bushels	100	90	2.71
Baled Straw	Tons	.75	.75	35.33
Nurse Barley	Bushels	88	79	2.71
Baled Straw	Tons	.75	.75	35.33
Alfalfa	Tons	4.5	4.1	52.99
Aftermath	AUM	1.5	1.5	5.48
Corn Silage	Tons	20	—	15.90
Corn Grain	Bushels	89	—	2.55
Aftermath	AUM	1.6	—	5.48

Dr. Jacobs for the State of Wyoming testified to lower yields for malt barley, 90 bushels for lowland and 80 bushels for highland,[70] and disagreed as well with the nurse barley yields. He relied on the Agee report and defended his position by stating it "appeared that those [Dornbusch's] malt barley yields were high".[71] His argument was based on a perceived need for a consistent use of the Agee report and he did not discuss the merits of Mr. Dornbusch's reasoning for deviating from the Agee figures for barley.

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[69] Tr. pp. 4952-4953.

[70] Tr. p. 14693.

[71] Tr. p. 14694.

I find the testimony and evidence of the United States on this matter to be more objective, complete and persuasive than that of the State of Wyoming. I appreciate and respect the qualifications of the economic experts for the State, but I find Dr. Jacob's testimony more argumentative than objective. His approach seemed guided by a preconceived opinion and predetermined direction to diminish the claim of the United States rather than a professional independence to analyze the merits of the projects. Mr. Dornbusch's development of the higher yield projection was reasonable and well supported by the evidence. The future projects incorporate state of the art technology and improved approaches to irrigation farming not currently used by farmers in the area. Better technology and management makes higher yields reasonably foreseeable, and given evidence of current similar yields already obtained by farmers in the area, I find the preponderance of the evidence clearly supports the projections of the United States.

(b) Production Costs

There still remains an additional point of disagreement between the parties on crop yields. The State of Wyoming argued that full yields could not be obtained for all crops on future lands in the first few years of production. This was attributed to cultivation of new lands, placement of equipment, and implementation of management techniques.[72] Mr. Dornbusch made no such reduction in his crop yield projections. However, he addressed the issue from the production cost side of the equation, increasing his per acre costs to account for the possibility of lower yields in the initial years of operation.[73] I find this cost method reasonable and an acceptable solution to the matter and, therefore, make no alteration to the crop yield projections of the United States.

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[72] Tr. p. 14716.

[73] Tr. p. 6133.

The crop prices used by both the United States and the State of Wyoming in the next step of the analysis were substantially the same. Both parties used normalized prices, with the United States using the period of 1974 through 1978 [74] and the State of Wyoming using 1975 through 1979.[75] This aspect brings the parties closer to agreement than in almost any other area of the economic analysis and therefore requires little comment. For the sake of convenience, and in light of my adoption of the crop yields of the United States, as well as the fact that Wyoming's prices are actually higher for malt barley, I adopt the crop prices of Mr. Dornbusch shown above, and find them supported by a preponderance of the evidence.

The determination of production costs produced a tremendous divergence of opinion which contributed significantly to the ultimate disparity between the parties' benefit-cost ratios. While the approaches of the United States and the State of Wyoming were similar, certain decisions reached and applications made by the economists were so diametrically contrary that they warrant individual treatment here.

Mr. Dornbusch developed a series of tables itemizing the various components of the production costs for each crop.[76] He used the format suggested by the Agricultural Extension Service and began with the report of Doug Agee as a reference point. Verification of all costs, operations and equipment used was made through interviews with farmers in the region.[77] Through those interviews and using his own experience and research, Mr. Dornbusch normalized all costs to 1979 figures after mak-

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[74] Tr. p. 4961.

[75] Tr. p. 14726.

[76] Tr. p. 4973; United States Exhibit WRIRC-268, Tables 2A-2E.

[77] Tr. p. 4974.

ing adjustments to compensate for higher yields projected, greater distances to travel, larger farm units, cooperative use of equipment, and use of unemployed Indians for labor.[78] His conclusions for production costs for the selected crops are as follows:

Crop	Per Acre Cost
Malt Barley	$142.73
Nurse Barley	$146.53
Alfalfa	$ 77.30
Corn Silage	$172.04
Corn Grain	$148.93

2. Machinery and Equipment

While there was some agreement from the experts for the State of Wyoming as to methodology and certain cost elements, several aspects of Mr. Dornbusch's production costs drew opposition. Specific areas of disagreement included farm unit size and the question of economies of scale, machinery prices, useful life and hours of annual use, labor costs, management costs, and normalization procedures used. These will be discussed individually.

Dr. Jacobs for the State testified that he determined his costs based on a 320 acre irrigated farm, which was the size used by Doug Agee in his budgets.[79] Consequently, a full array of equipment would be required for each 320 acre tract. Mr. Dornbusch, on the other hand, approached the question by determining what would be the most efficient level of use of any given piece of equipment without establishing acreage limitations, based on his assumption that the projects could be developed and managed either cooperatively by groups of Indians or as a tribal enterprise. The equipment would be communally used under his scenario to service as many acres as

[78] Tr. pp. 4975-4995.

[79] Tr. p. 14848.

feasible and would not necessarily be associated with a particular tract of land. He admitted that this was a deviation from the Agee report, but testified that his discussions with Agee supported the assumption.[80]

I find the approach taken by Dornbusch more realistic, and his assumption of tribal cooperation on the projects is not only reasonable, but well supported by the preponderance of the evidence. The 320 acre limitation suggested by the Agee report is understandable in light of the reclamation laws existing during the settlement of lands by non-Indian farmers and has a relevancy when discussing those lands. The Wind River Reservation Indians obviously are not bound by those restrictions in the development of the future projects and may therefore reasonably rely on the most efficient use of all machinery in determining an appropriate production cost estimate.

My finding that the preponderance of the evidence supports the equipment efficiencies of Mr. Dornbusch receives further support from the testimony given in Worland by several ranchers and farmers. Mr. Burchill Hopkin of Powell, who is secretary-treasurer of the Elk Water Users Association and an irrigation farmer of about one thousand acres, testified on cross-examination as to the degree of use of his machinery. When asked about the scale of his operation, he responded, "I could not afford the same amount of machinery that I have if I were only operating 320 acres. I can barely afford it at a thousand acres.[81]

I accept the Dornbusch position that it is not necessary to establish specific acre tract sizes in evaluating the production costs of the future projects and to do so imposes arbitrary restrictions on what would most likely be the approach to development of the lands by the Tribes. When a cooperative use of the machinery can be antici-

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[80] Tr. p. 4980.

[81] Tr. pp. 14344W-14345W.

pated, the more prudent approach is to examine the best use of that equipment. But even if a tract size were to be selected, the 320 acre suggestion of the State of Wyoming is unrealistic and can only lead to an unreasonable inflation of the production cost estimate.

The second distinctive area of disagreement is a corollary of the above discussion. The State of Wyoming contended that the figures of the United States for machinery prices, estimated life and hours of annual use were unrealistically low. Mr. Dornbusch testified that he derived his prices and depreciation schedules from the Agee report figures, normalized to 1979 prices as adjusted or confirmed by farmer interviews.[82] Dr. Jacobs obtained his figures from a variety of sources.

Both experts nevertheless agreed generally as to what constituted necessary pieces of equipment needed for the farm operations. Much of this evidence was considered under the Historic Lands section, *supra*. A detailed discussion of this matter is therefore unnecessary.

The United States clearly met its burden of proof on estimates for prices, useful life and hours of use. Mr. Dornbusch's approach was reasonable and obtained figures which could realistically be expected in the future lands development. He used reliable sources consistently, applied sound assumptions based on the anticipated method of development, and verified the figures obtained by interviews with farmers in the region. The experience and knowledge of an active farmer in this matter can equal or surpass that of an economic expert and reliance on their input can only add credibility and support to any conclusion based on their input.

The State of Wyoming was unsuccessful in shifting back the burden of persuasion on this point through the testimony of Dr. Jacobs as to his prices, useful life and

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[82] Tr. pp. 4977-4985.

hours of use. This aspect of the testimony exemplifies an earlier remark in this report concerning the advocacy, rather than objectivity, of the economists for Wyoming. The cross-examination of Dr. Jacobs raised serious doubts in my mind as to his selection of figures and brought me to the conclusion that some prices were selected to serve an end result rather than as a fair estimate of a reasonable cost. Overall, the preponderance of the evidence clearly supports the United States machinery prices, depreciation schedules and estimated hours of annual use.

3. Labor Costs

The next area of disagreement concerns the employment outlook for Indians on the Reservation and the appropriate costs to attribute to farm labor for the projects. It should be noted that the economists did agree on the economic principle of opportunity cost and setting the value of an item by determining its next best use. They further agreed that the opportunity cost for labor may be set at zero when that labor comes from unemployed individuals with a bleak outlook for employment in the near future. The dispute arises in the determination of the proportion of the labor costs for the future lands which have a zero opportunity cost.

Mr. Dornbusch determined that the rate of unemployment on the Reservation creates a situation where the supply of labor far exceeds demand. He also concluded that skills necessary for farm labor would be present in the available work force. His information and statistics were obtained directly from the Bureau of Indian Affairs on the Reservation as well as from interviews with people knowledgeable in similar situations and in the historic experience of the Indians on the Reservation.[83] He testified that unemployment on the Reservation for the past ten years has consistently remained at a level of about

[83] Tr. pp. 4987-4988.

forty-five percent.[84] Given these facts, he determined conservatively that eighty percent of the labor costs would be zero in his economic analysis, based on the assumption that unemployed Indians would constitute that percentage of the labor force. The remaining twenty percent of labor would be at a full opportunity cost.

Dr. Jacobs for the State of Wyoming testified that he would cost farm labor on the Reservation between seventy-five and one hundred percent.[85] He disagreed with Mr. Dornbusch's assumptions as to the use of unemployed Indians for labor and the continued high level of unemployment on the Reservation. He did not conduct any interviews nor any independent research to support his conclusions, but relied mainly on his own "judgment call".[86]

I find that a high percentage of unemployment exists on the Reservation and conclude that the preponderance of the evidence clearly supports the position of the United States on farm labor costs. The United States met its burden of proof on the matter with the testimony of Mr. Dornbusch and the information upon which he relied. The history of the Reservation consistently shows a level of unemployment far in excess of the rest of Wyoming. That condition may well continue in the future and a reliance on such an assumpton is reasonable. Additionally, the very nature of the future projects supports the assumption. To enhance the prospects of success, the Indians must approach the development of the future lands cooperatively and work together on an ongoing basis to insure their continued productivity. Such an involvement almost dictates a significant role for the Indian labor force on the Reservation.

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[84] Tr. p. 4989.

[85] Tr. p. 14828.

[86] Tr. p. 14733.

4. Management Costs

The next area of disagreement, managements costs, closely relates to the farm labor cost dispute in light of the relative positions of the parties. Mr. Dornbusch followed an accepted practice of using a percentage of the production cost subtotals for his management costs.[87] He selected ten percent as his rate for two reasons. First, that is the rate used by the Water Resources Council and is higher than rates used by agricultural extension service people, including Doug Agee. Second, he felt that the higher rate would be consistent with his use of progressive farming techniques which would reasonably result in higher management costs.

Mr. Dornbusch then adjusted those figures to reflect his assumption that some of the management costs could be reduced through the use of unemployed Indians who would be trained by skilled managers. He developed a schedule of training Indians to assume management positions, starting with the figure of ten percent in the first year as the amount of management to come from the unemployed. Each year for the next nine years he would then replace an additional ten percent of the management with unemployed Indians who would receive similar training. To me this is another application of "incremental methodology." Within ten years of the start of the projects, then, the entire management of the future lands would consist of formerly unemployed Indians. Finally, he then applied his discounting techniques to determine a present management cost for the economic analysis to account for this multi-year plan.

The position of the State of Wyoming conflicted with Mr. Dornbusch's management cost conclusions on two grounds. First, Dr. Jacobs maintained that management costs should be proportionate to gross returns rather than

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[87] See generally Tr. pp. 4990-92 for a discussion of Mr. Dornbusch's approach.

the subtotal of productions costs. Dr. Jacobs admitted that he was not positive how this disagreement would affect the relative cost estimates, but guessed that his approach would produce slightly higher costs.[88] Second, the State renewed its assertion that the full cost of management should be used, and should not be decreased through anticipated use of unemployed Indians. In light of my conclusion below regarding the second matter, and given the uncertainty expressed by Dr. Jacobs himself as to the significance of using returns rather than costs to determine management costs, I find it unnecessary to discuss the first matter at length and conclude that a preponderance of the evidence supports Mr. Dornbusch's application of the management cost rate to the production cost subtotals.

I reiterate my findings and conclusions regarding use of the unemployed Indian labor force and adopt them as they relate to management costs, although I recognize that the management question presents a different situation. Absent a showing that the current labor force on the Reservation already possesses the necessary management skills, it would be unreasonable to expect all of the management to come from the unemployed at the outset of the development. Mr. Dornbusch acknowledged that, and specifically planned for proper training to take ten years. I find such a time period and training program to be reasonable and a preponderance of the evidence supports such a position. Irrigation farming, like so many other aspects of our society, has developed sophisticated approaches and specialized techniques and equipment. A progressive management plan would obviously require training in those techniques and some time and training must therefore be anticipated. But that can be accomplished on a gradual basis within ten years and ignoring such a possibility can only unreasonably inflate the management cost estimates.

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[88] Tr. p. 14734.

5. Normalization Process

The final area of disagreement on production costs is the normalization procedure used by Mr. Dornbusch to bring all costs to a common 1979 price. The normalization process, as discussed earlier in this report regarding crop prices, is the multiplying of each cost figure by a factor designed to "smooth out" the fluctuations in prices which are higher or lower than their true "representative" price.[89] Normalization is more than the removal of the inflation factor in costs because it attempts to adjust for the inevitable fluctuation of prices in a given year which is caused by a variety of factors unrelated to inflation.

Mr. Dornbusch used the normalization factor adopted by the Water Resource Council, which is a statistical approach for determining what the smooth price curve is through the use of historic prices.[90] Recent prices are given greater weight as being more representative of the target price and the goal of the entire process is to achieve a process whereby prices for four given years can be weighted to predict the price for the fifth year. Mr. Dornbusch varied from the original Water Resource Council guidelines in that he normalized both costs and returns so as to have a common set of figures to use in his analysis. When he brought this discrepancy to the attention of "staff" members of the Water Resource Council, Dornbusch testified that the individual contacted indicated a change in the principles and standards to reflect Dornbusch's finding would probably be made.[91]

Dr. Jacobs offered little concrete evidence as to the scope of his disagreement with Mr. Dornbusch's approach, how his position differed, and what real effect the dis-

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[89] Tr. pp. 4959, 5014.

[90] Tr. pp. 5014-5015.

[91] Tr. pp. 5016-5017.

agreement has on the respective economic analyses of the two economists. In his sensitivity analysis, Dr. Jacobs criticizes Mr. Dornbusch as being "confused" on the normalization process and the prices used in Mr. Dornbusch's analysis.[92]

In light of my ruling on the normalization of crop prices, and given the testimony and evidence discussed here, I find Mr. Dornbusch's approach reasonable, professional and supported by a preponderance of the evidence. Dr. Jacob's criticisms are not persuasive and offer no objective, positive alternative. Mr. Dornbusch's use and reliance on Water Resource Council advice and statistics is prudent and reflects as accurate an approach as could be required in a field which attempts to estimate a price for a given year.

The rest of Mr. Dornbusch's analysis, with the exception of the application of a discount rate, consists primarily of the application of the above prices and results to the structure of the analysis. One potential area of dispute, water delivery system costs, proved to produce such similar results from the economists that the State of Wyoming considered the point moot.[93] I will adopt the United States' figures for consistency and will not discuss the matter further. Calculations left to be done include accounting for the crop distribution in the highland and lowland areas as it relates to costs and returns, weighting the returns to the project areas and the appropriate percentage of highlands and lowlands in each, and accounting for the on-farm irrigation costs and irrigation system costs. These calculations do not represent a substantive aspect of the analysis. As such, a detailed analysis of each step and calculation is unnecessary in reaching a conclusion on economic feasibility.

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[92] Plaintiff's Exhibit WRIR EJ-2, p. 14.

[93] State of Wyoming's Proposed Findings of Facts, Volume V, Part III, Findings 18-33, p. 815.

6. The Discount Rate

The final disagreement in economic feasibility determination is the discount rate to be used in the analysis. Few matters are more complex, less exact, or certainly more divisive than the question of what is the appropriate discount rate. Economists from all sides urged and argued the concept and application and came to little or no agreement. The United States felt this matter was so singularly important that it elected to devote its entire rebuttal case to discount rate.

A discount rate was necessary in the economic analysis by virtue of the approach used to determine the feasibility of the future projects. The economists structured their studies by looking at the developments as one hundred year projects. Obviously, that entails projection of costs and benefits for the entire period but comparison of the two sets by a single reference point. A computation becomes essential to bring those costs and benefits back to a present value which can be analyzed fairly and consistently with all other values involved. The discount rate performs that task—determining the present value of the 100-year stream of costs and returns associated with the projects.

For those who became so intimately involved with this case, I have probably devoted sufficient discussion to the definition of discount rate and to its importance in the analysis. But to those who approach this subject for the first time, who may have a 15% home mortgage, 19% automobile loan, or who have watched the prices of groceries or gasoline in the past few years, one further observation is in order. The economists generally agreed that their studies excluded present or expected inflation and concentrated on what the "real" discount rate should be. It is apparent that if inflation were a factor in the discount rate, four percent, for example, would not be realistic. But inflation is not a factor in determining the discount rate for this economic analysis. It may seem

that such an exclusion reduces the entire study to an academic discussion and voids it of any realistic or probative value. The very nature of an economic analysis does make it academic to some degree, because it is an attempt to estimate future benefits and costs, their present values, and whether the value of the benefits exceeds the value of the costs. However, that analysis has definite probative value in evaluating the claims for the future lands and, as long as inflation is absent from both sides of the equation, the analysis can be helpful in evaluating the projects. In a society and world which has learned to live with staggering rates of inflation and economic uncertainties, it is difficult to accept an analysis which excludes that concern. But it must be kept in mind that inflation has not always been such a menace, that it may not be so prevalent in the future, and that it affects both sides of the equation when it is present.

The United States presented two very competent witnesses in its case in chief and rebuttal to testify on discount rates. Mr. Dornbusch, as part of his analysis, testified that his research and professional opinion led him to the conclusion that the correct rate was in the range of two to four percent.[94] He selected the upper end of that range for his analysis and felt four percent to be a conservative rate.

Dr. Stephen Goldfeld, currently a professor of economics at Princeton University and chairman of the economics department, testified on rebuttal as to his opinion of the appropriate rate and also in response to the testimony of the experts for the State of Wyoming. His credentials were extremely impressive and his experience clearly made him an expert witness on the subject matter. He testified that his range of rates would be one to four percent and would select two and one-half as the correct rate if required to do so.[95]

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[94] Tr. p. 5049.

[95] Tr. pp. 15517-18.

Dr. David Brookshire, an associate professor of economics at the University of Wyoming, was called by the State of Wyoming to present his opinion on discount rates and how it applies to the economic analysis. He tesitfied that one single discount rate should not be selected, but rather a range of rates should be used to represent the diverse sectors of the American economy.[96] He selected a range of four to eleven percent for his feasibility analysis as appropriate.

The Tribes also presented testimony on the subject through Dr. Ronald Cummings, professor of economics and director of the Program in Natural Resources Economics at the University of New Mexico. He took the initial position that discounting was not necessarily proper in evaluating the future projects inasmuch as we are dealing with the needs of future generations of Indians which may be as important as the needs of the current generation. He did conclude, however, that he would select, if required to, a discount rate between two and four percent.[97] He also felt that Mr. Dornbusch's analysis may have been too conservative regarding secondary costs and benefits.

Analyzing the testimony of expert witnesses who are in substantial disagreement is never an easy task, and this item is no exception. However, in listening to and weighing the testimony and evidence, I am of the conclusion that the preponderance of the evidence clearly supports the conclusions of Mr. Dornbusch and I adopt his analysis as a very professional, objective and reasonable study of the future projects. No doubt must exist as to my reasons for this conclusion, because it definitely is not based on a potential intimidation that three experts must be better than one. To conclude as I have on that basis would be clearly imprudent, and might en-

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[96] Tr. p. 14522.

[97] Tr. pp. 8871-77; 8880.

courage future litigation to become parades of experts in an effort to be the party with the most experts. It is for this reason that the following analysis and discussion is doubly essential.

Dr. Brookshire supported his analysis with an article published by Professors Fraumeni and Jorgenson entitled, "Rates of Return by Industrial Sector in the United States, 1948-76." [98] That article presents average rates of return for a variety of sectors in the American economy scanning a period of 28 years. Rather than using the aggregate rate calculated in the article to determine a weighted average real rate of return for all sectors, Dr. Brookshire developed his own summary, which excluded certain sectors and brought him to his range of rates of seven to eleven percent. The most significant sector excluded was the household sector, and that, together with a basic distinction between average rates and marginal rates, caused Dr. Goldfeld to be critical of Brookshire's conclusions.

Dr. Goldfeld argued that the household sector should not be eliminated from the analysis. Since the economic analysis concerns the diversion of capital away from existing projects to the proposed development, he contended that capital could just as easily come from the household sector as from any other sector. The various sectors should be treated equally, and Goldfeld warned that the selection of sectors from the Fraumeni-Jorgenson analysis should not be reduced to a "beauty contest." [99]

The second disagreement Dr. Goldfeld had with Dr. Brookshire's conclusions concerns the opportunity cost of capital, the possibility of diverting it to the new projects and the role "marginal" rates as opposed to

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[98] Tribes' Exhibit DB-1.

[99] Tr. p. 15557.

"average" rates plays. Dr. Goldfeld's discussion of this is eloquent and succinct enough to warrant its inclusion in its entirety.

> The Fraumeni-Jorgenson study basically gives us average rates of return. That is okay on its own terms as an estimate of average rates of returns. With the qualification of data revisions, I have little quarrel with the study. On the other hand, for purposes of making opportunity cost calculations and for defining a discount rate for making those opportunity cost calculations, the relevant thing is not the average rate of return, the relevant thing is the marginal rate of return, i.e., the rate of return which is earned on the last project, if you will, or the last bit of capital investment because when resources are diverted away from something, they are not diverted away from the average project, the best project is still going to get done, they are diverted away from the weak sister project, the one that just scrapes by.
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> And it is very critical in this kind of thing to make the proper distinction between average and marginal. The reason it is critical is the marginal can be much, much more than the average, perhaps as much as a half or a third of the average rate of return.[1]

Given the economic principle of the diminishing marginal productivity of capital, Dr. Goldfeld concluded that the marginal rate would be lower in this analysis, but that it would be the more accurate approach.

In addition to the above conclusions, the prevailing economists supported their positions with sound economic principles and various aspects of other pertinent analyses. I find their arguments and conclusions more persuasive and I am compelled to agree with Dr. Goldfeld's response to Dr. Brookshire's analysis.

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[1] Tr. pp. 15505-06.

Furthermore, I find it incredible that an economic or sensitivity analysis could conclude that not a single acre of the future lands claimed is economically feasible! I do not need to address or rely on Dr. Cummings' position that a benefit-cost ratio analysis may be improper in this case, nor that it is not the only means to find land irrigable. Furthermore, the Tribes' position that an economic benefit analysis is only one test to determine practicably irrigable acreage need not be addressed in light of this conclusion. The testimony and evidence of the United States through two excellent economists stands unrefuted in the conclusion that certain acres of land are economically feasible to irrigate.

In addition to the above evidence and testimony upon which I base my conclusion, there is one additional bit of testimony so much on point as to warrant its inclusion here as further basis for the conclusion. At the December, 1981 hearings in Worland, Mr. Willard Wilson testified on ranching and farming in part from his role as a director of the First State Bank of Thermopolis. When asked on cross-examination about inflation, risk factors in lending, and the profit margin expected by a bank, Mr. Wilson testified, "I mean, it just comes back to plain old business there, and you're probably going to advance money between, and that depends upon the circumstances, from a half a percent to three percent." [2] While I readily agree that "profit margin" and "real discount rates" are not synonymous terms, they nevertheless are closely related and one certainly affects the other. This testimony clearly shows how a financial analysis will change when inflation is not a factor and certainly lends support that the Dornbusch real rate has a financial world counterpart that is not too dissimilar.

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[2] Tr. p. 13927.

7. Conclusion and Summary of the Final Measure of Award After Economic Tests

All of the above leads to the conclusion of what lands are practicably irrigable and therefore deserving to be the measure of a reserved water right. Excepting 10% for purposes above stated, I find that a preponderance of the evidence supports the case of the United States and, given the reduction of acreage as discussed earlier in this Report, I find the acres below to be practicably irrigable, and conclude that they should be the measure of a reserved water right for the amounts stated.

Project	Net Acreage	Unit Diversion (acre-feet/acre)	Total Diversion (acre-feet/year)
North Crowheart	34,993	3.81	133,324
South Crowheart	4,238	4.29	18,181
Arapahoe	3,437	4.39	15,088
Riverton East	3,442	4.60	15,837
Big Horn Flats	2,410	2.70	6,507
TOTAL	48,520		188,977

G. LIMITATION ON EXPORTING AND CONSTRUCTION SCHEDULES

1. Exporting

Under "Groundwater", *infra*, the exporting of groundwater is measured by the evidence to deny its practice, and findings are made accordingly. Here, we deal with the exporting of surface water, both that which is herein awarded based on historic irrigation and as the measure of practicably irrigable acres in future projects.

Beginning with the dicta of *Winters* and repeated often in the briefs and arguments of federal parties, the assertion is advanced that without water, the Wind River Indian Reservation Land would be worthless. Time and again this premise is advanced to justify an implicit re-

served water right.[3] Does it not follow therefore that permitting other than agricultural and related uses for waters awarded appurtenant to historically irrigated land, if carried far enough, can virtually destroy the purpose for which the Reservation was created? If not, can it be denied that at least the land will then "be worthless," on which the very premise rests for a reserved right in the first place? It is difficult to escape the conclusion that if the Indians wish to let long established farmland go to dry land grazing and lease water to others, that this practice falls within the guidelines of several legal authorities that the best water law is that which leaves the owners of a water right with a "choice to do what they wish for the most efficient use of their resource."[4]

It is a difficult matter, and there is a bleak silence in existing law or decisions with which to be guided.

The Tribes have asked for enough water to satisfy agricultural and related use on historic lands for themselves, for Indians holding land in fee, and including Type VII and Type VIII lands, and for Tribal future projects. We have stressed that this does not mean that reserved water may not be used for purposes other than agricultural and related uses. The question of use, or change thereof, is not one of the items contained in the Judge Joffe reference for my determination.

What is fairly before me, however, is the conspicuous fact, woven throughout the evidence in this long trial, that a consumptive use by Indians over and above the consumptive use determined on the practicably irrigable acres, which serve as the measure of this award, would constitute an unjust denial of water to downstream uses in Division 3.

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[3] See section Intent and Purposes, *supra*, p. 56.

[4] See Trelease, Frank, *New Water Legislation*, XII, Land and Water Law Review, 2, p. 414-428.

I therefore find that in order to assure full rights to Indians without violence to the full rights of others, limitations of volume and scheduling on said consumptive use must be set for any surface waters herein awarded, historic or futures. I find that there is no other way to deal justly with the users of return flow.

The summary finding from all of the evidence regarding consumptive use of existing and proposed irrigable acreage ranges from 20% to 30% of diversion requirements.[5] Thus, the decree herein will limit consumptive use of waters whether used on or off the Reservation to no more than 25% of the annual diversion amounts awarded herein in the event there is to be exporting of surface water off the Reservation, or used upon the Reservation for other than agricultural and related purposes. Such use is limited to 10% of 25% of the annual diversion in each decade following the date of this Report, unless upstream storage is in place to provide for additional incremental storage. Nothing herein shall prohibit the leasing or bargaining of Tribal waters to downstream users or other entities within Division 3, one consideration of which would be the non-use by Indians and a dedication of said water to non-Indian agricultural and related uses in Division 3.

2. Limitation on Construction Schedules

The award herein for future projects is charged with one additional limitation. Because the incremental method has been relied upon by federal witnesses to support economic feasibility, I feel it only fair that it can be employed in this decree to avoid the possibility of economic damage to other water users in the Division.[6] Further,

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[5] Tr. p. 5239.

[6] Witness Dornbusch testified that a percentage of the unemployed Indians will be used each year over and 10-year period to obtain full management personnel for new projects from the ranks of unemployed Indians. Tr. pp. 4991-92.

this is an application of the "Rehnquist doctrine" that reserved water rights should be applied with sensitivity.

This decree will reflect that only a certain percentage per decade of the total futures acreage should be completed and into full-scale operation so that the full award of future projects will not be completed and in operation, unless, of course, upstream storage facilities shall have already been constructed to provide for the additional water requirements of said future projects.

This would accomplish several things. It would encourage all parties, state and federal, Indian and non-Indian, without coercion or compensation, but purely in their own self interest, to welcome and participate in negotiations and encourage the legislative and negotiating processes which would authorize and appropriate costs of upstream storage facilities. The time is ripe for said discussions. Blue Holes alone has a possibility of 175,000 acre-feet per year of usable annual yield. It would store over 400,000 acre-feet of water most years.[7]

This incremental construction schedule is of assistance to the Tribes in that there would be for the first time a certain and definite decree basis for both Tribal water and Tribal acreage for project construction. It would be of equal assistance to the United States in that it would be assured a definite schedule and incremental additions to the reserved doctrine being applied, and this would fulfill the United States' obligation to the Tribes without incurring immediate financial risks flowing to the benefit of Wyoming state water right owners.

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[7] It is true that the smaller amount of water which is kept in storage in a reservoir, the less that is lost to evaporation and spillage, but the greater becomes the risk of inadequate storage to meet future needs. One cannot predict how the United States, the Tribes and Wyoming will strike a balance between these competing factors in the operation of the Wind River upstream storage facilities in the future.

And lastly, Wyoming would benefit from said construction scheduling also, as she would be provided at long last with a certainty of Indian and federal planned uses for water in Division 3. I take notice that federal legislation now seeks to settle the *Winters* rights in various western states by a combination of negotiation, followed by ratifying legislation. One proposed bill receiving encouragement from the Western Resources Council would provide compensation for those who are prohibited from exercising the full rights they own because of the establishment of a reserved Indian right. Such a bill might well trigger a decade of uncertainty and great expense if some manner is not found to obtain upstream storage soon, and thus mitigate federal liability and achieve a just decision without its enactment.

I believe all of the tragedy of such a course can be averted if this decree requires incremental construction of all new practicably irrigable acres and will be followed thereafter of rapid construction of Blue Holes impoundment. I believe this throws a burden on no one. The Indians cannot be heard to complain as the evidence in this case is without proof that the Indians are capable of raising funds within the immediate future necessary for full construction projects to put water on the futures land. While there is no duty upon them to do so, nevertheless an objection would have been credible had there been some evidence of the availability of financing. As it is now, it appears that no matter what benefit-cost ratios are arrived at, or discount figure used, in the real world of today's interest and inflation and uncertainty in agriculture, doubt persists that much of the "futures" land may ever be a part of any newly constructed irrigation project.

This being the case, the decree herein will limit construction to no more than ten percent (10%) of total awarded acreage for future projects in any given decade following the date of this Report, unless upstream storage facilities are in place.

III. THE DETERMINATION OF PRACTICABLY IRRIGABLE ACRES ON THE RESERVATION'S ADDITIONAL TRIBES FUTURES

Two lingering bits of evidence: 1) the appearance of Stagner Ridge in a list of State awarded water rights following the 1905 Act;[8] and 2) the wide disparity between the arable base of Big Horn Flats (19,644 acres)[9] and the awarded acreage of 2,410 acres,[10] have caused me to closely re-examine all the Tribes' exhibits that dealt with their request for 25,000 acre-feet per year of additional water to serve 9,970 arable acres that had been excluded by the Stream experts and other United States witnesses on Stagner Ridge and Big Horn Flats.

These two additional claims are sited on impressive, elevated terrace benches and my review included the testimony of Dr. Lyman S. Willardson and of his two associates, Ron Bliesner and Jack Keller. Their testimony was a recapitulation of the statements, charts and maps contained in Tribes' exhibits involving irrigation system design and engineering review of the conceptual irrigation development plan for the Wind River Indian Reservation.

This required a direct, virtually page by page comparison, with United States Exhibit WRIRC-245, which was a similar conceptual irrigation development plan published by Stetson Engineers.

The Keller exhibits stated that the on-farm irrigation system, pipeline distribution system, canal pumping plant, and drainage system portions of the Stetson irrigation development plan were analyzed for their adequacy of

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[8] Plaintiff's Exhibit SR-13 Revised, although Stagner was obviously cancelled years later for non-use.

[9] United States Exhibit WRIRC-43, p. 27.

[10] See page 205 of this Report.

design and the appropriateness of cost. From all this, the Keller people concluded that certain physical features of the pumping plant were more elaborate than needed, i.e., they would build them without roofs in climatic conditions of Central Wyoming, and felt that these reductions from the Stetson pumping facilities were appropriate. Mr. Keller insisted that some Stetson cost figures were high considering the volume of materials involved, and used as a basis to justify cuts, that the latest life "cycle costing techniques should have been employed to optimize the design component." In fact, I found the word optimize used so often in the Keller reports that I was constrained to look up its definition—to find it is nothing more than optimism. Mr. Keller cocnluded that sprinkler operating pressures were higher than necessary, and by reducing the pressure on sprinkler systems, felt it could make savings accordingly. Dr. Willardson found that the drainage intensity was too high and stressed that on having been consulted months earlier by the Stetson people for review of their findings, there was no mention made of reviewing the drainage intensity at that time.

Mr. Keller concludes that these findings rest upon "the possibility for streamlining and *optimizing* the design" in "using lower, but nevertheless appropriate, unit prices. This in turn resulted in a significant lowering of the component and operating costs as compared to those prepared by Stetson." (Emphasis added.) The Keller report summary is concluded with the statement that the canal systems "and related structures in the Stetson plan were not analyzed because there was insufficient time to adequately review and investigate these features."[11] I can appreciate this observation, and Wyoming's proposed findings remind me that Dr. Willardson engaged in an entire field effort on which he relied to draw many of his

[11] Tribes' Exhibit 13, p. 2.

conclusions for a 9,264 acre project over a period of less than two hours of actual examination.[12]

Though it may be a more unkind cut than is warranted, Wyoming's proposed findings also observed that "the entire field effort upon which Dr. Willardson relied to reach his conclusions regarding drainage of all proposed future projects took place over a period of twenty hours. This is equivalent to an intolerably hasty examination of over 2,500 acres per hour. Assuming Dr. Willardson met the Bureau requirements of 1/4th mile transects for a semi-detailed investigation, he must have set a new world record for the marathon with a time of 1 hour 37½ minutes. And all while wearing a tie and street shoes!" [13]

As if the above review of the Keller Engineering is not sufficient to conclude that the additional claim of the Tribes futures should be summarily rejected, there is the following fact.

Stetson engineers, who excluded the Stagner Ridge and Big Horn Flats Extension on the basis of cost, are the same Stetson engineers on whose expertise I have relied for including the acreage of the five future projects earlier referenced herein. Their expertise was evident in *Arizona v. California*, and is internationally recognized. Their work herein has been looked upon with authority and with respect by virtually all of the Wyoming experts who testified, as has been noted in the section prior to this dealing with the futures.

So if Stetson eliminates Stagner and Big Horn Flats and if the testimony of Dr. Mesghinna is to be relied upon as thoroughly as was done in the futures section, how can it be disregarded in this instance when Dr. Mesghinna and other Stetson experts, in designing the

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[12] Tr. p. 8694.

[13] Wyoming's Proposed Findings of Fact, Part III, p. 838.

entire irrigation projects for these areas, excluded the two after consultation with United States' economists?

If the United States did not seek water rights for these lands, having examined them and concluded they are not practicably irrigable, is it not obvious that this fact should control in rejecting these two projects? I will play devil's advocate with these questions for several pages.

Having been rejected by the United States, a much higher test of acceptability ought to be shown by these two projects to overcome the conclusions of the United States' experts themselves that these areas would not meet the test for practicably irrigable acres.

Despite all that has been said on these two above premises, there is a nagging doubt in my mind that seems to rise naturally from all of the evidence entered about rejecting Stagner Ridge and Big Horn Flats extension. I am reminded of the observations made in *Jones on Evidence*,[14] published in 1912, and affirmed by many legal scholars since, of the observation regarding expert testimony:

> ". . . The notorious fact that experts of equal credibility and skill are found in almost every important cause testifying to directly opposite conclusions illustrates . . . the fallibility of such testimony. . . . It is a matter of common observation in the courts that witnesses of the highest character and undoubted veracity may be easily led as experts to expouse and defend a theory with all the zeal of an advocate. . . ." Section 390 at p. 491.

Therefore, should I not hold—not because of the Willardson testimony, but in spite of it—that the 9,970 acres so vigorously asserted by the Tribes as being equally

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[14] Jones, Burr W., *The Law of Evidence in Civil Cases*, 2nd Ed., April 1912 (Bancroft-Whitney, SF).

deserving of reserved-right water as the future acreage asserted by the United States as guardian, should be included in the allowable acreage? No acreage in all Division 3, and on all the Reservation—futures, historic, adjudicated, unadjudicated, fee or otherwise—has as economic a water duty as the Big Horn Flats Extension and the Stagner Ridge futures. *Both* the experts for the United States and for the Tribes come up with a figure for the annual diversion requirements for this entire acreage of 2.52 acre-feet per acre per year, and conveyance efficiencies in closed pipes exceeding 95%, factors of efficiency for higher than that of any other project on the Reservation.[15]

Assuming that remaining efficiencies in these two projects will be as favorable as those on the remainder of Big Horn Flats and North Crowheart, then Stagner and the Big Horn Flats Extension could result far and away in the most efficient, rather than the most questionable, of futures programs. The 2.52 water duty for these two proposed areas is the most favorable of any area on the Reservation, or for that matter, anywhere else in Division 3.

But two indelibly important experiences from all of the evidence and argument herein adduced keep tipping the scales away from the devil's position here, and man-

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[15] Tribes' Exhibit 13, pp. 4-5. In this study, since there are seepage losses between the diversion and the main pumping station that must be accounted for in the diversion requirements, but not applied to the water pumped, the concept of conveyance and distribution efficiency was applied differently. Distribution efficiency is taken to be the efficiency of the system from the main pumping plant to the on-farm systems; and the conveyance efficiency is taken as the efficiency from the diversion dam to the main pumping plant. Since the canal is lined and the remainder of the distribution system is closed conduit, a distribution efficiency of 95% is used. The canal from the diversion to the pumping plant is short, limiting the opportunity for seepage so a 95% conveyance efficiency is used.

dating that my finding must repect all acreage of both these Tribally recommended projects. These factors are:

First, Dr. Willardson's testimony will not disappear from mind in that he would reduce the drainage planned for all the other Mesghinna projects, costing these savings to these extension projects, which he claims would then be economical.[16] This testimony reminds me of the burdens faced by Congress and the settlers in Division No. 3 and along the Bid Muddy—the Farson project and the Kendrick project—after several generations of obstensibly similar regard for proper drainage and of the failures that ensued.

To accept this evidence would be to repeat the mistakes of the past and to risk again new areas where insufficient drainage would again leave fields as soggy, wet lands, and large, caked areas of alkali flats.

The second reason was the James Merrill argument which was raised against these extensions, and I cite Mr. Merrill's admonitions of setting in a bank of 9,000 horsepower pumps at the ridges of Stagner and Big Horn Flats as carrying to an unacceptable degree the expense necessary for projects of this size.[17] It also served to remind me that if I am to put credence in the Mesghinna testimony that North Crowheart's approximate 35,000 acres is economically doable, even though 59 covered pump stations are to be constructed, I must also accept his testimony that similar facilities for Stagner Ridge and Big Horn Extension's 9,970 acres simply render them uneconomical.

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[16] Tr. pp. 8665-8720.

[17] Tr. p. 15037. See also Tr. pp. 15049-15052 on yields, costs overruns.

For reasons listed first in this section, and as a result of the balance tipped against them as explained above, I find that no acreage can be included from either the Big Horn Flats Extension or Stagner Ridge in the tabulation of a quantified reserved water right for the Wind River Indian Reservation.

PART THREE

I. GROUNDWATER

Compared to the masssive effort that dealt with practicably irrigable acres and the quantification of allowable diversions therefor, there is little evidence or argument regarding groundwater under the various Federal enclaves in Water Division 3, notably the Indian Reservation.

Certainly it has been the policy of the Tribes to drill wells for both domestic and livestock uses of the Indians, and deeper wells for water for secondary recovery of oil in the Reservation's oil fields. There is a void in the record of indications that Indians applied for state permits to drill their domestic wells. From certain exhibits we find that operating oil companies on the Reservation have applied for over the years, and have received from the State Engineer, Permits to drill for secondary recovery water.[1]

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[1] Watts, Tr. p. 11573, *infra*. Also, water requirements for domestic, municipal and commercial uses were identified by witnesses for Dornbusch and Company. Page, Tr. p. 803, *et seq*. This testimony concluded that the expected increases in water requirements would not be significant as long as there were live streams recharging the groundwater sources involved (Tr. p. 1031). Messrs. Page and Brogden were the respective experts for the positions of the United States and the State, accordingly. Each made reconnaissance studies and testified regarding potential well yields. Mr. Page said his probability for accuracy concerning well yields on United States Exhibit WRIRC-31A, Table 3, was considerably better than fifty percent (50%). (Tr. p. 1030) In contrast, though not addressing specific yields of wells along tributaries, Mr. Brogden was very bearish on development generally, charging that overactivity in either area will do damage to both surface and groundwater sources. Mr. Merchant of Dornbusch and Company determined that it was economically doable to develop oil, gas, coal, uranium, phosphate rock and gypsum (Tr. pp. 520, 547-8, 552-4, 568, 573, 586), and

These mineral resources and corresponding water supplies are found to be reasonable, but the sources will not

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Mr. Page put the usage as follows, based upon Exhibit C31-A, Table 4 (see chart below).

Mineral/ Activity	Location	Peak Annual Water Use (Acre-Feet)	Required Continuous Pumping Rate to Meet Peak Annual Water Demand (gpm)	Water Sources
Oil Enhanced Recovery (Existing)	Multiple Locations	6,580	4,080	Wind River underflow and various sources of local deep ground water including, but not limited to, the Madison formation, Big Horn dolomite and Frontier formation.
Gas Refining (Existing)	1S-6E (East of Riverton)	6	4	
Sulfuric Acid Production (Existing)	1S-4E (Riverton Area)	95	60	Wind River formation and/or municipal surface or ground water (Wind River formation).
Anhydrous Ammonia Production	1N-4E (Riverton Area)	4,250	2,630	Wind River formation and/or municipal surfaec or ground water (Wind River formation).
Coal Surface and Under-Ground Mining	6N-1E (Muddy Creek Area)	25	15	Shallow to moderate depth ground water in local sandstone and conglomerate beds (Fort Union, Lance and Mesaverde formations).

[Continued]

apply to additional volumes of water needed to meet the future needs for these activities.

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[1][Continued]

Mineral/ Activity	Location	Peak Annual Water Use (Acre-Feet)	Required Continuous Pumping Rate to Meet Peak Annual Water Demand (gpm)	Water Sources
In Situ (Gasification and Syngass Production	2S-6E (Alkali Butte Area)	2,800	1,740	Wind River formation (off-site), or moderate depth groundwater in local sandstone and conglomate beds (Lance and Mesaverde formations) or deeper aquifers.
Electricity Generating Station	6N-1E (Muddy Creek Area)	2,490	1,540	Wind River underflow (off-site).
Uranium Underground Mining	7N-5W	15	9	Local shallow to moderate depth ground water (Aycross and Wind River formations or equivalents).
Yellowcake Processing	7N-5W	475	290	Wind River formation and/or Crow Creek surface flow or underflow (off-site).
Phosphate Underground Mining	1S-2W	5	3	Little Wind River underflow.
Beneficiation and Calcining Plant	1N-4E (Riverton Area)	425	260	Wind River formation and/or municipal surface or ground water (Wind River formation).

[Continued]

As noted, *infra*, the deeper acquifers are to be the source for future industrial expansion, and this is necessary so that live streams will not be overburdened in recharging aquifers and thus endanger surface flows upon which both present and future irrigation depend on the Reservation and downstream in Division 3.

A. THE *CAPPAERT* DECISION

The dominant case (cited in both the briefs of Wyoming and of the Tribes as holding totally opposed conclusions) is, of course, *Cappaert v. United States*.[2] It

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[1] [Continued]

Mineral/ Activity	Location	Peak Annual Water Use (Acre-Feet)	Required Continuous Pumping Rate to Meet Peak Annual Water Demand (gpm)	Water Sources
Phosphoric Acid Production	1N-4E (Riverton Area)	400	250	Wind River formation and/or municipal surface or ground water (Wind River formation).
Gypsum Surface Mining	7N-1E to 3W	10	6	Local shallow to moderate depth ground water (Chugwater Group and Park City/Phosphoria formation).
Wallboard Production	1N-4E (Riverton Area)	300	190	Wind River formation and/or municipal surface or ground water (Wind River formation).

[2] *Cappaert v. United States*, 426 U.S. 128, 48 L.Ed.2d 523, 96 S.Ct. 2062 (1976).

involved Devil's Hole, a cavern on Federal Land in Nevada containing an underground pool and inhabited by unique species of desert fish. It was reserved as a National Monument in 1952 by Presidential Proclamation. In 1968 the Cappaerts began pumping water from the same source as the water in Devil's Hole, thereby reducing the water level in Devil's Hole endangering its fish species. Subsequently, the Cappaerts applied to the Nevada State Engineer for permits to change the use of water from several of their wells. The National Park Service filed a protest; the State Engineer overruled the protest and granted the permits; the United States then filed suit to limit the Cappaerts' pumping of their wells. The District Court permanently enjoined Cappaert pumping that would lower the water below a certain level necessary to preserve the fish, holding that in establishing Devil's Hole as a National Monument, the President reserved appurtenant unappropriated waters necessary for the purpose of that reservation, including preserving the pool and its fish, and that the Federal rights antedated those of the Cappaerts.

The Court of Appeals affirmed, holding that as of 1952, when the United States reserved Devil's Hole, it acquired by reservation the water rights sufficient to enjoin Cappaerts from pumping if said pumping impaired the existence of the fish in the pool. It held that when Federal Government reserves land from the public domain, by implication, it reserves water rights sufficient to accomplish the purposes of that reservation; and that the purpose of reserving Devil's Hole being the preservation of the underground pool, the Court appropriately tailored an injunction to the minimal needs thereof, curtailing pumping only to the extent necessary to preserve a water level adequate to protect the pool's scientific value, as a natural habitat of the fish species sought to be preserved.

The findings also held that since the implied-reservation-of-water doctrine is based on the necessity of water for the purpose of the Federal reservation, the United States can protect its water from subsequent diversion whether the diversion is of surface water or groundwater.

The *Cappaert* case is a unique pronouncement. It is capable of serving two diametrically opposite goals, in this case, the goal of Wyoming and the Tribes. The State cites *Cappaert* in support of its position of refusing the Tribes a reserved right to groundwater, citing a *Cappaert* "Headnote II" which says:

II

GROUNDWATER

> No cases of this Court have applied the doctrine of implied reservation of water rights to groundwater.[3]

And the Supreme Court then refutes the Nevada argument that the implied-reservation-of-water doctrine applies not to groundwater by finding that the water in this pool is *surface* water. "The Federal water rights were being depleted because, as evidence showed, the groundwater and surface water are physically interrelated as integral parts of the hydrologic cycle." This quotation is made by the Supreme Court in citing its groundwater expert, whose statement on this interrelationship squares with that of Wyoming's counterpart witness, Robert Edwin Brogden,[4] and the United States' witness, Oliver Page.[5]

But the statement under II above ceased to be the truth on June 7, 1976, for it was on that date that the

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[3] *Cappaert v. United States, Ibid*, at p. 142; 48 L.Ed.2d at 536.

[4] Tr. p. 11840.

[5] Tr. p. 769.

Supreme Court handed down *Cappaert*, thus producing the first case in history to apply the reserved doctrine to groundwater, although it is called by yet another name.

And the Supreme Court buttresses this action by quoting studies of the Congress of the United States, by the National Water Commission issued in 1973. The following quote, from one of the Nation's outstanding water authorities who is counsel to Wyoming in the instant case, was included in that study:

> "There appears that Nevada itself may recognize a potential interrelationship between surface and groundwater since Nevada applies the law of prior appropriation to both. . ." [6]

Only if the purpose for which the Wind River Indian Reservation was created is threatened with defeat can the Cappaert doctrine conceivably be applied herein. And comparing the Cappaert facts to those of this adjudication leaves me no alternative but to reject out of hand the United States argument that uses of groundwater by non-Indians around and within the Reservation can be enjoined if found deterimental to the aquifer levels under Reservation surface.

To defeat the very existence of two Tribes of Indians numbering in the thousands and living on 2,500,000 acres of land is one thing; to limit non-Indian use of a groundwater source on which some Indian and non-Indian landowners depend, and into which both drill with equal right and common concern, is quite another. There is nothing in *Cappaert* law, or in the Winters concept, or in the evidence of this long proceeding, which warrants a right to the Tribes to impinge upon the groundwater users of adjoining areas, or those of fee-owned inholdings

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[6] See generally F. Trelease, "Water Law—Resource Use and Environmental Protection," 457-552 (2nd Ed. 1974): C. Meyers and A. Tarlock, "Water Resources Management," 553-634 (1971).

within the boundaries of the Reservation. The findings herein warrant this conclusion and the proposed Decree will reflect it.[7] This recognizes of course that neighbor-

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[7] This is the subject involved in the Riverton Airport matter on page 7, Introductory Statement, supra.

From the transcript, beginning at page 781, there occurred one of the several exchanges that peppered this trial regarding the scope and effect of groundwater usage to be adjudicated. It follows:

> THE SPECIAL MASTER: Earlier you mentioned that you have an interest in the formations totally without the boundaries of the Reservation because they constitute one of the sources that might very well contribute water toward some of the structures under the surface of the Reservation. I'm not inclined to want to agree with that.
>
> MR. MEMBRINO: I think what Mr. Page was testifying to is the location of the Wind River formation under the Riverton area. The United States is making claims for use of water, whether it be surface or groundwater only for development of lands held in trust or resources held in trust for the Indians. We're not talking about a claim for lands held by non-Indians. I think that point has to be maintained.
>
> THE SPECIAL MASTER: Yeah, but what you're maintaining is that the United States has a proprietary right and ownership to groundwaters under, under non-Indian surface if those groundwaters are necessary for the well being of the Indians who live in a different area from that, where that water is found. Isn't that what you're maintaining?
>
> MR. MEMBRINO: I'm maintaining—in a word, yes, but it should be made clear that we have to look at this just as we look at surface water. The fact that surface water occurs off the Reservation, perhaps a hundred miles away and is sufficient only to serve the needs of the first priority, be it Indian or non-Indian, then a remote water user cannot interfere with that—with that water supply to the detriment of the prior right holder. So it's—
>
> THE SPECIAL MASTER: You think that concept applies to groundwater as well as the surface water?
>
> MR. MEMBRINO: I think emphatically the reserve right extends to groundwater and the—
>
> THE SPECIAL MASTER: This concept of no interference until a prior owner has a right to use it does apply to ground-

ing citizens who use groundwater from a common source may quarrel over causes of groundwater depletion. Groundwater management to conserve aquifer life is a relatively new but fast growing reality. There is no reason to limit its practice to non-Indians alone.

B. MINERAL RESERVATION CLAIM

Nor is argument of Federal counsel persuasive that the minerals under the surface of Riverton are reserved for the Tribes. Acts of June 5, 1920 and March 4, 1921 (41 Stat. 874, 915, and 1367, 1404) provided funds for the Riverton Reclamation Project. The United States did not purchase any lands, but authorized funds for construction of the project. About 100,000 acres were

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water as well as surface water? And if so, what's your authority of that, if you believe that?

MR. MEMBRINO: I would refer Your Honor to the United States Supreme Court decision in the *Cappaert* case, which was decided in 1976, and recognized that the need for water, groundwater to maintain a national monument would be held paramount, the right for that—to that water would be held paramount to an off-monument groundwater user. And we have gone, we have briefed this issue—

THE SPECIAL MASTER: You've answered my question.

MR. WHITE: May I say one thing?

THE SPECIAL MASTER: Mr. White.

MR. WHITE: First off, the characterization of the *Cappaert* case extending the reserve right doctrine to groundwater is one that the State must violently disagree with, because the Supreme Court said it doesn't involve groundwater. The second point I'd like to make is that the position Mr. Membrino seems to be taking is a far reaching one because I notice the Madison formation is one of the formations beneath the formation (sic) [Reservation], and carrying his argument to its logical end, is that the Wind River Indian Reservation would be able to control the development of Madison formation because Madison formation happens to be underneath the Reservation. That is the reason, not the legal basis, but the reason that the State is so anxious about this water issue. (Tr. pp. 781-784.)

sold to non-Indians and proceeds credited to the Tribes as provided by the 1905 Act. Subsequently, some 70,500 acres not required for the project, as with other unsold land, were restored to full Tribal ownership by the Act of August 15, 1953 (67 Stat. 592).

The 1953 Act was unclear as to minerals because it provided in Section 5 that ninety percent of the revenues from minerals under the lands purchased by the United States would be paid to the Tribes, but did not make clear whether leasing would continue under Indian Mineral Leasing Laws or public land laws. See *United States v. Seaton*, 248 F.2d 154 (10th Cir. 1955). By the Act of August 27, 1958, 72 Stat. 935, Congress legislatively overruled *Seaton* and made clear that, as to the lands purchased in the 1953 Act, "all of the right, title, and interest of the United States in all minerals, including oil and gas" are "declared to be held by the United States in trust for the Shoshone and Arapahoe Tribes" and must continue to be leased under the Indian land leasing laws.

This recognition of the Tribes' ownership of the minerals under the reclamation area was consistent with an earlier act of August 21, 1916, 39 Stat. 519, in which Congress empowered the Secretary of the Interior to lease the lands subject to the 1905 Act for oil and gas exploration "under such terms and conditions as shall be by him prescribed" with the proceeds of royalties from the leases to be "applied to the use and benefit of said Tribes."

A mineral reservation results from the explicit language of a statute; an implied reservation of water does not. A reserved mineral clause in withdrawals is a matter of public record, and is consistent with patents which were issued to the settlers on the ceded lands. It would have been an act of repugnance for Congress to have also reserved groundwater from the early settlers who had

an immediate dependence upon water wells for their very existence.

The Tribes maintain that a reserved right assures them the use of replenishable groundwater. "Both their reserved right and their ownership of the resources of the Reservation assure the Tribes the use of minable groundwater if they choose and their prevention of such mining by anyone else." [8]

I disagree. Ownership of the Reservation is indeed exclusively in and for Indians, and Wyoming has been careful in these proceedings not to violate that ownership, nor to commit acts that would do violence to her own Constitution, which disclaims any right, title, jurisdiction or control of said lands.

C. WATER IS NOT LAND

The water in the aquifers which occurs in the formations of said lands is a constantly changing amorphous body of liquid and is just that—water—and not land. It is water that moves by virtue of seepage, percolation, conductivity, or other natural movement. Unlike land, it is transient in its nature. It is groundwater today which was yesterday's surface water flowing in the Wind River or its tributaries. Congress has ratified that this water is the property of the State of Wyoming. This adjudication is designed to establish the rights of the various parties to the use of said water. This adjudication will award and prioritize rights to the United States and to the Indian Tribes for the permanent use of set amounts of water, mostly surface and some ground. It will confirm or affirm adjudicated state rights of several thousand citizens to similar water uses, surface and ground. It will define the status of many uncancelled permits to said use. What it is not authorized to do is to pass upon ownership of state water.

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[8] Plaintiff's Exhibit WRIR BG-3, first page.

D. EVALUATION OF RESOURCES

An evaluation of the resources was made by Oliver Page for the United States' position, an expert in hydrogeology and groundwater uses. Similarly, Mr. Robert Brogden, a groundwater geologist, testified for the State and added his expertise to the complex formations and hydrologic structures of the Reservation. Both were credible and professionally solid and, of course, differed more than somewhat in their conclusion.

To determine presence and extent of groundwater, Mr. Page identified the geology, and conducted pump tests to measure well pumping rates and groundwater levels.[9]

Mr. Page considered the groundwater facilities to be in a virgin condition where it was found that they had not been developed or drawn down heavily. I find that his testimony warrants the conclusion that on the Wind River Reservation there is abundant groundwater supply in virgin condition.[10]

Little was stated regarding safe yield due to the fact that groundwater use is neither concentrated nor in significant quantities to make realistic determinations of safe yield. Mr. Page determined an amount of groundwater in storage in the Quaternary deposits comprising saturated alluvium of the Wind River Reservation in the area of 360,000 acre/feet, but that not all of this water is available for pumping from wells. He concluded that the alluvium is essentially full of water under present conditions of water development; and further stated the glacial and landslide deposits are not significant to groundwater supply, nor are the terrace deposits which are generally elevated above streams and creeks and cannot receive significant infiltration from surface flows.

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[9] United States Exhibits WRIRC-31A, C-32.

[10] Tr. pp. 920-23.

The one Tertiary deposit apparently rich as an aquifer is the Wind River Formation.[11] It is a deposit of interbedded sandstone conglomerate, silt stone, clay stone and shale, and contains other minerals, and ranges in thickness from zero to approximately 5,000 feet. Outcrops of the Wind River Formation are present throughout the central portion of the Reservation. In addition to the Wind River, the Madison, Fort Union, and Bighorn Dolomite are late Tertiary and older formations, and generally occur deeper, that have proven to be water-bearing.

The witnesses agree that the principal source of water saturating the alluvium is surface water from streams flowing over the alluvium deposits, and this geologic fact requires certain limitations upon the use of the groundwater which will follow. Other sources are irrigation return flows, some precipitation, and side flows into alluvial deposits from other formations. Well yields were stated and the findings will rely upon said yields. I find that Mr. Page's estimated well yields were professional and consistent with the practice of others in his profession, and that his reliance upon United State's geological survey data for the well fields of Cottonwood Creek, Muddy Creek, Five Mile Creek, Kirby Draw, and Beaver Creek, was also reasonable and consistent.

There is no question that the Indians have the right to the use of the groundwater in the various aquifers beneath the land which is theirs, in trust or in fee. Yet the extent of the claims asserted by the United States and the Tribes renders it necessary to examine closely the evidence dealing with said aquifers and the virgin and historic flows of the Wind River to see if limitations are in order. Limitations may be necessary to assure adequacy of surface resources.

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[11] Tr. p. 772-73, United States Exhibit C-31A.

Wyoming observes[12] that there is sufficient groundwater on the Reservation for most proposed uses, and encourages a finding that future increases in water uses for municipal, domestic and commercial purposes may be met without the use of surface water. I agree, and so find.

The evidence reveals that at some locations the Madison Limestone occurs within 3,000 feet of the surface. The Big Horn Dolomite and the Frontier Formations are also listed as sources of groundwater.[13] Wyoming recognizes that the proposed mineral and resource developments include the enhanced recovery work at two oil fields, natural gas processing where existing needs are currently being met, and coal mines, an electric generating station, a phosphate rock mine, one anhydrous ammonia plant, a phosphate rock benefication and acid production plant, a wall board manufacturing operation plant, are all uses which can find sufficient water from groundwater sources. I find that this is a fact, and I conclude that these proposed uses should rely upon the Madison and other "deeper" sources, rather than on the Wind River aquifer, and other terrace and shallow aquifers that depend directly upon the Wind River for their life. My reasons follow.

Evaluation of groundwater resources was made by witnesses Oliver Page for the position of the United States, and Robert Brogden for the State of Wyoming. Each is an expert in hydrology and groundwater uses. Each testified on the unique interrelationship of surface and groundwater, and the adverse affect upon one if inordinate use is made of the other. I find there is sufficient evidence for me to conclude that unregulated development of shallow groundwater, if allowed, would so lower aquifers of the alluvium, such as the Wind River formation,

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[12] Plaintiff's Proposed Finding 36-3.

[13] United States Exhibit WRIRC-31A (Table 4).

and other shallow structures adjacent to the Wind River, that irreparable harm will result to all users relying upon the Wind River for existence. Regarding the Tribes' claim to a right to mine water and enjoin others from doing the same, witness Brogden testified that "it simply cannot be done to preserve groundwater levels and still develop either surface or groundwater." [14]

While I have doubts about the effect of that generalization until the word "develop" is defined, I nevertheless have a healthy respect for the obvious truth of that concept. Therefore, limits to the use of groundwater must be made, particularly when the claims of the Tribes, coupled with those of the United States in their behalf, tend to push the effect of the word "develop" beyond acceptable means, or beyond the fondest dreams envisioned by the authors of the *Winters* concept.

> Example: The United States claimed in behalf of Tribes a total of 570,304 acre-feet per year for irrigation alone; surface water claims for livestock and municipal, domestic and commercial uses of 6,583 acre-feet per year; in addition to groundwater rights for additional water for these purposes; plus 10,048 acre-feet per year for the Arapahoe Ranch. To these totals the Tribes claimed 45,390 acre-feet per year more for irrigation; 25,159 acre-feet for irrigation of additional future lands, and a contingency claim of 20% of all totals, or 131,026 acre-feet per year, and in addition, all of the groundwater resources for future needs of the Indians, a quantification in terms of acre-feet being impossible because the recharge rate of the various aquifers is at present unknown and unknowable.[15] This is in effect a

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[14] Tr. p. 11852.

[15] United States' Statement of Claims, *supra*; Amended Statement of the Shoshone and Araphoe Tribes Concerning the Measurement of Tribal Reserved Water Rights, filed July 20, 1981.

claim for nearly 800,000 acre-feet per year of surface water, plus the right to mine unlimited quantities of groundwater for whatever purpose, present or future. Such a demand strains credulity.

Example: A claim for both minimum stream flows as part of the aesthetic "belt"; minimum stream flow for fish and wildlife preservation, coupled with claims for maximum development of every practicably irrigable acre asked for—these claims simply compete with one another. They appear to exceed original stream flows on twelve of the Wind River tributaries—these claims therefore by their very volume and nature are in conflict one with another, and this must be recognized before any test for a just measure of award is applied.

E. SUMMARY AND AWARD

In summary, the decree herein will grant rights to the use of groundwater to the Tribes, subject to the limitations and conditions mentioned above.

1. This decree will grant no right to anyone or entity, Indian or non-Indian, to mine groundwater; nor will it grant any right to replenishable groundwater by requiring others to abstain from beneficial use of groundwater under their own surface.

2. The Tribes are awarded the use of groundwater which is fed by the Wind River, The Little Wind, The Popo Agie, into the Wind River aquifer and other shallow terrace and river-level formations for domestic, livestock, and present commercial uses, in the amounts now being used, and in increases rendered necessary by population growth. A right to surface diversion from the Big Wind, the Little Wind, and the Popo Agie for municipal and domestic uses, in amounts listed in the table below, is also awarded herein.

I find that Mr. Merchant's study is a reasonable estimate of the Indian population, its growth, and the

present and projected need for water for municipal, domestic and commercial purposes. I find that the Tribes are entitled to a reserved water right with a priority date of 1868 for those purposes, in amounts based on Mr. Merchant's conclusions, but in no event to be more than the following figures through the year 2020:

		Acre-Feet Per Year		
Area	Source	1980	2000	2020
Riverton	Big Wind River	18	32.4	46.8
	Groundwater	18	32.4	46.8
Fort Washakie	Little Wind River	455	799.2	1,166.4
Ethete	Little Wind River	257	450.0	658.8
Boulder Flat	Popo Agie River	26	44.4	67.2
Arapahoe	Groundwater	155	273.6	397.2
Pavillon	Groundwater	2	3.6	4.8
Remainder	Groundwater	110	193.2	283.2
	TOTAL	1,041	1,828.8	2,671.2

All shallow aquifers are not to be used as a water source for future industrial development. The lower or deeper of the water bearing formations, i.e., the Madison, Big Horn Dolomite, and the Frontier, are the proper sources for water for said future industrial activities.

3. Several questions remain to be answered. They include whether or not geographic limits on use might be found to exist; whether a restraint can be placed on said other uses so that the burden of loss of return flow is not suffered by subsequent water users; and finally, whether a reserved right is terminated when leased, assigned, or otherwise used in commercial transactions.

It is now firmly established that water reserved for Indian Reservations may be used for purposes other than agricultural and related uses, and the question of change in character of use is not before me. However, and as mentioned earlier in this section, the geologic evidence herein requires certain limitations on groundwater usage

in order to assure that abuse will not result in irreparable damage to the Wind River aquifer and to all who depend upon it for survival.[16]

It is self-evident that aquifers are the last reserve for potable water for men, women, and all creatures who live.

For this and other reasons and evidence alluded to above, the exporting of groundwater outside of the stipulated boundaries of the Reservation is denied.[17]

In view of the jolting effect of the *Sporhase* case[18] upon Western water law, a few words are in order to distinguish the above ban on exporting groundwater from the unprecedented assertion of the Supreme Court that groundwater is an article of commerce which was unreasonably burdened by a Nebraska ruling not to allow a farmer, whose contiguous lands straddled the Nebraska-Colorado border, from irrigating his Colorado acres from a well located on his Nebraska land.

The *Sporhase* majority asserts that Congress has not granted the States permission to engage in groundwater

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[16] My authority for this limitation rests primarily upon the geological fact that to rule otherwise would constitute a clear danger to the source of groundwater for Indian and non-Indian alike who reside in the general area of the Wind River aquifer and other similarly shallow structures. It is sometimes addressed as a limited police power. It is buttressed by a good bit of statutory law (Wyoming Statute 41-10.5, Supp. 1974, 41-3-105), and similar laws which have long existed throughout America affecting the withdrawal and transportation of groundwater from one state to another. My decision here is dictated by the geologic facts in this case, not by statute. For a thorough pre-*Sporhase* treatment of this subject, see an article by George A. Zunker, X. *Land and Water Law Review*, No. 1, p. 119 (1975).

[17] The limitations on uses of surface water, and the effect upon users of return flow, is dealt with in the Futures section, *supra*, (page 205) as is the matter of leasing and assignments of rights.

[18] *Sporhase v. Nebraska ex rel. Douglas*, —— U.S. ——, 73 L.Ed. 2d 1254, 102 S.Ct. —— (No. 81-613), decided July 2, 1982.

regulations that would otherwise be impermissible. Of course I agree, and hastily add that what Congress did indeed grant the States permission to do was to conduct general mainstream water adjudications. Wyoming, in pursuance of this Congressionally awarded McCarran Amendment role, has conducted a thorough adjudication of the entire Division, including all of the Wind River Indian Reservation, the potential for surface storage of water throughout the Division for the good of Indians and non-Indians alike, and has concluded that the recognition of reserved water rights for the Reservation does not carry so far as to reserve a right to export groundwater from the Reservation, this not being one of the purposes for which this Reservation was founded nor is the exporting of groundwater necessary for the well being and future of this Reservation or of its Indians when surface water exists for this purpose.

Nor can the Indians be heard to complain upon a Commerce Clause analysis of this prohibition to exporting groundwater. In this proceeding, a measure of future annual water requirement has been found based upon practicably irrigable acres. That water is being allowed full use by the Indians under the Commerce Clause or export provisions, at least that portion of the water consumptively used were it not to be exported.

Nature is at least afforded an opportunity annually to renew the resources which give life to the Reservation and which flow from the snow pack of the mountain ranges of the Wind River Indian Reservation. If the Indians choose to export certain amounts of these surface waters awarded in this proceeding, they are free to do so. At least annually there is an opportunity for renewal of the storage and for an opportunity to guage water short years. It's not that simple when acquifers are mined or overdrawn.

To permit exporting of groundwater is to jeopardize the very existence of the Wind River itself, a fact that is

undisputed in the long evidence obtained specifically on this point.

For the above reasons, we believe the law, as well as the facts, clearly distinguishes *Sporhase* from the instant adjudication. In fact, it can be argued that if these proceedings were to award Indians the right to export groundwater while others are denied the same, *Sporhase* could be cited against the Indians to upset such a conclusion.

II. FISHERIES, WILDLFE AND AESTHETICS

A. WILDLIFE AND AESTHETICS

Instream flows were claimed for the preservation of fishery habitat and, in addition, areas of aesthetic and wildlife value. By the United States' experts' definition, the "fishery flow" means the optimum mean monthly flow which will produce maximum fish habitat in a given stream reach. We will dispose of the wildlife and aesthetic claims first.

The "aesthetics and wildlife flow" claim means one hundred percent (100%) of the naturally occurring water in the lakes and streams in said aesthetic areas. The entire flow of some 64 streams—later reduced to 51 streams—is claimed for aesthetic and wildlife purposes.[19] Most of these streams, upon which a claim for total flow was made, occur in the two areas designated as the Aesthetic Belts of the Reservation. They are:[20]

> *Belt No. 1*: An elongated "foot-shaped" area (facing east) imprinted across the northern third of the Reservation, its ankle being the northwestern boundary; its heel, Crow Creek Canyon and Black Mountain; its long instep, a strip of high country including the Owl Creek Mountains; and its turned

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[19] See list under Indian Claims section, *supra*.

[20] United States Exhibit WRIRC-7.

up "toes", the geologically famous canyon of the Wedding of the Waters, the "confluence" of the Wind and Big Horn Rivers.

Belt No. 2: A right-angled triangle, the sides of which are the boundaries of the Reservation that join to form the southwesterly corner thereof, and the hypotenuse of which is a line traversing the west end of Bull Lake generally parallel to the Wind River, but west of it, and running from Sacajawea Ridge to the North Fork of the Popo Agie about ten miles from Lander.

Since non-consumptive in use, and the opposition rather minimal to their assertion, it would appear to be a relatively welcomed and unanimous matter to grant this claim for 100% instream flows for the streams mentioned in the two Aesthetic Belts of the Wind River Indian Reservation. But two facts arose from the evidence which prevent it.

First, the claim and the evidence for industrial and mineral development water requirements left a clear inference that phosphate beneficiation, uranium processing, and coal and gypsum development could very well take place in the "instep" area of Belt No. 1, and along the eastern or lower edges of Belt No. 2. And here I find that the Tribes are indeed the Masters of their own fate regarding instream flows. I do not intend to oversimplify this new development in Wyoming law, regarding instream flows in that they cannot "have their water and consume it too", so to speak.

Second, the evidence is persuasive that for the maintenance of an aesethetic and wildlife value, a stream which carries a flow of sixty percent (60%) of capacity will serve the same purposes for aesthetic and wildlife habitat as will a stream at maximum historical flows.[21]

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[21] Tr. p. 11442-43. Witness Keith makes distinctions between flows for fisheries habitat and for aesthetics and wildlife. He quotes and

I therefore find that the sixty percent (60%) figure is a proper one for instream flows applicable to streams in all areas of the Aesthetic Belts on the Reservation, as detailed on Exhibit WRIR-7.

Wildlife is mentioned in the Fort Bridger Treaty of 1868, and the hunting of wildlife is thus found to be one of the purposes for which the Reservation was created. In fact, the Treaty also granted certain rights to Indians for off-reservation hunting until said lands were to be occupied by settlers. Thus a reserved right for a reasonable wildlife instream flow in the high county "Aesthetic Belts", as described in Exhibit WRIR-7, is warranted.

The Decree herein will accordingly carry out the finding discussed above and the 60% factor will be used on all claims for instream flows in the two aesthetic belt areas of the Wind River Indian Reservation. No aesthetic and wildlife instream flow award is in order for streams or portions of streams not clearly within the boundaries of the two Aesthetic Belts as defined on Exhibit WRIR-7. Instream awards on the remainder of the Reservation will be done under the Fisheries claim. We turn now to the more complex matter of fisheries.

B. FISHERIES

During 1979 and 1980, the United States Fish and Wildlife Service in Lander developed instream flow recommendations for fishery resources on 16 selected stream reaches on the Reservation of current or potential importance for fisheries to the Tribes. The methodology used was developed by the Cooperative Instream Flow

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makes the same recommendations that 60 percent of average flow "will be excellent to outstanding" for wildlife and aesthetics. At 60 percent the stream channel is essentially completely occupied by water. A higher percentage would appear to increase velocity only, and it is not until you reduce volumes to 20 percent or so that a dried-up appearance is evident, and the aesthetic quality becomes diminished.

Service Group, an agency of the Fish and Wildlife Service. Both witnesses Vogel, for the Federal parties, and Sinning for Wyoming, testified to the values and conceptions employed by this group, each having had experience in working with it. Mr. Vogel developed mean monthly instantaneous flows (MMF) in the stream reaches to "maximize the available fish habitat." [22]

Once again we find the subtle advancement and purpose to be the "maximization" of a goal rather than the establishment of normal or ordinary levels, but we will deal with this later.

The 16 stream reaches are described in the following tabulation, together with the claimed monthly flows for each reach:

[22] United States Exhibit WRIRC-280.

FISHERY FLOWS

Mean Monthly Flows (cfs)

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Stream Reach 1—Wind River (above Dinwoody Creek)	179	177	185	320	320	320	320	320	320	320	233	201
Stream Reach 2—Wind River (between Dinwoody and Bull Lake Creeks)	201	200	207	284	500	500	500	500	500	444	302	239
Stream Reach 3—Wind River (between Bull Lake Creek and Diversion Dam)	254	249	258	371	500	500	500	500	500	500	365	291
Stream Reach 4—Wind River (between Diversion Dam and Little Wind River confluence)	256	250	260	325	325	325	325	325	325	325	325	293
Stream Reach 5—Wind River (below Little Wind River to boundary of Boysen Reservoir Withdrawal Area)	393	384	396	500	500	500	500	500	500	500	500	439
Stream Reach 6—Wind River (Wind River Canyon)	399	390	444	500	500	500	500	500	500	500	500	444
Stream Reach 7—East Fork Wind River (below Wiggins Fork)	45	43	45	95	207	207	207	207	123	82	56	49
Stream Reach 8—Bull Lake Creek (above Bull Lake)	29	31	29	47	215	215	215	215	180	83	45	33

FISHERY FLOWS—Continued

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Stream Reach 9—Bull Lake Creek (below Bull Lake)	30	33	31	50	255	255	255	255	178	76	41	32
Stream Reach 10—North Fork Little Wind River (below North Fork Canyon)	19	20	20	26	80	80	80	80	69	35	23	20
Stream Reach 11—South Fork Little Wind River (below Washakie Reservoir)	22	25	23	31	110	110	110	91	72	41	28	23
Stream Reach 12—Little Wind River (above Popo Agie River confluence)	49	51	51	71	75	75	75	75	75	75	61	52
Stream Reach 13—North Fork Popo Agie River (below North Fork Canyon)	17	16	15	26	77	77	77	77	52	34	23	19
Stream Reach 14—Popo Agie River (below the North and Middle Forks and above Little Wind River confluence)	48	46	46	94	172	172	172	172	140	91	63	53
Stream Reach 15—Dinwoody Creek, below Dinwoody Lakes)	15	14	14	21	110	110	110	110	95	38	21	16
Stream Reach 16—Crow Creek (above Crow Creek Canyon)	3	3	3	6	12	12	12	12	7	5	4	3

In addition, the United States and Tribes claim that if the above flows, plus historic and future irrigation requirements, cannot be satisfied, that they be granted the right to construct storage facilities so that all their competing claims alone can be fulfilled.

We examine first the question of whether a reserved right exists or can be implied for fisheries habitat, and if so, what its limitations are before exceeding or distorting the purposes for which the Reservation was created. And next is resolved the question of a right to the construction of upstream facilities to satisfy Indian needs alone.

The Federal parties argue that maintenance of fisheries is one of the purposes for Congress having created the Wind River Reservation. Wyoming asserts otherwise, citing the absence of the word "fishing" from the Treaty and citing *United States vs. New Mexico, supra*, in which a bare majority of the United Supreme Court denied fisheries and wildlife minimum instream flows in the National Forests. Wyoming also cites the *Coleville Confederated Tribes* Ninth Circuit reversal as authority that granting such rights herein transcends the provisions of the 1868 Fort Bridger Treaty. A review of these cases and of briefs reveals that in at least three cases the Courts have recognized an implied reserved right for fisheries.[23]

Where history reveals that a tribe was at least partially dependent upon fishing, or that fishing was a significant factor in its lifestyle, there is ample precedent for such a reserved right. The problem here is not whether a right

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[23] Even where no express or specific language grants fishing rights to a tribe, the Courts have occasionally found or implied a reserved right for fishery maintenance if necessary to preserve the traditional lifestyle of the tribes. *Menominee Tribe vs. United States*, 391 U.S. 404, 20 L.Ed.2d 697, 88 S.Ct. 1705 (1968); *Coleville, supra*; *United States v. Anderson*, No. 3643 (E.D. Wash.), July 23, 1979.

exists. The testimony of Robert N. Harris, Sr., Chairman of the Shoshone Business Council, both on direct and as described on cross-examination by Mr. Krob, underscores the history and present importance of fishing to the Shoshones.[24] The problem instead is, exactly how much water can be decreed to flow the stream reaches for this purpose? To permit the amounts requested in the table above is to accept what one expert says is maximizing the case for fishing, and another of equal qualification says is an obviously excessive flow.[25]

Upon further examination of evidence on quantifying this use, it is appropriate to note that fishing on the Reservation, while at one time solely what is described as subsistence fishing, of latter years has become a profit making proposition for the Tribes. During the Vogel testimony, there were introduced into evidence a series of exhibits[26] revealing this activity, and the information gleaned from mailed and creel questionnaires distributed to anglers. For example:

> During 1980, 2778 fishing licenses were sold to non-Indian anglers for use on the Wind River Indian Reservation (WRIR) for the April through September fishing season. . . . 871 seasonal, 451 seven-day, 90 three-day, 327 two-day, and 1,039 one-day [licenses]. In addition, 84 ice, 105 courtesy (spouse, children) and 14 special (enrolled other tribes) permits were sold.[27]

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[24] Tr. pp. 7926-27; 7943.

[25] See differing statements of witnesses Vogel, Tr. 6494; and United States Exhibit WRIRC-280, "Instream Flow Recommendations For Fishery Resources In The Major Rivers And Streams On The Wind River Indian Reservation, Wyoming," and Sinning, Tr. p. 15273.

[26] Plaintiff's Exhibits WRIR FISH-200, 201, 202, 1-A, 2 and 4.

[27] Plaintiff's Exhibit WRIR FISH-202, p. 1.

These exhibits also revealed a catch-to-effort ratio on the various lakes in the high mountain country of the Reservation and particularly on the following streams:

Lowland Stream C/E Summary

	Hours of Fishing	Fish Caught	Catch/ Effort
Entire Wind River	818	380	0.46
Wind River Canyon	704	216	0.31
Bull Lake Creek (below reservoir)	120	107	0.89
Bull Lake Creek (above reservoir)	110	135	1.22
East Fork	79	42	0.53
South Fork	68	89	1.31
Little Wind River (above reservoir)			
Dinwoody Creek	32	23	0.72
Little Wind River	19	9	0.47

Wind River C/E Summary
(Including Wind River Canyon)

	Hours of Fishing	Fish Caught	Catch/ Effort
April	108	51	0.47
May	211	61	0.29
June	160	38	0.24
July	370	150	0.41
August	373	164	0.44
September	250	101	0.40
Unknown Months	50	31	0.62
TOTAL	1,522	596	0.39 [28]

1. Stream Reach Distinctions

It is obvious from the above that the impact of fishing for the non-Indian who purchases a license and fishes the Reservation is obviously greater on the main stem of the

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[28] Plaintiff's Exhibit WRIR FISH-202, p. 3.

Wind River rather than on the various Popo Agie or Little Wind streams or tributaries. It also should be noted that in the award of a fifty percent (50% aesthetic and wildlife instream flow that would inevitably benefit and inure to the various forks and the main stem of the Little Wind since they virtually headwater in the Aesthetic Belt No. 2. For these reasons, Stream Reaches 10, 11, and 12 on the Little Wind, and Stream Reaches 13 and 14 on the Popo Agie, will be dealt with differently than those on the main stem of the Wind River.

The testimony of witness Vogel supports the claim of the United States for an instream flow for fisheries, but we believe that his incremental methodology developed is still not so certain in its conclusions as to be given flows in the amounts recommended. We accept and place credence also in the testimony of Mr. Sinning, and particularly find that one of his criticisms of what he called numerous errors of Mr. Vogel was one regarding percentage of annual virgin flow in which we believe there is substantial validity.[29] On one Stream Reach, Mr. Vogel was claiming 44.4% of the virgin flow as "optimum flow". Other methodologies according to Mr. Sinning have stated that 30% would be adequate flow to maintain a good fishery. Maybe they're saying the same thing.

For this and other reasons which were apparent from a comparison of all the evidence herein, we believe that the instream flows requested for Stream Reaches 1, 2, 3, 4, 5, 6, 7, 8, 9, 15 and 16 are appropriately reduced to fifty percent (50%) of the claimed flow. And even Stream Reach 6, because of overriding contractual obligations with the Bureau of Reclamation regarding releases at Boysen Dam, would have to be modified so that no requirement for flows shall result in violation of con-

[29] Tr. p. 15273.

tracts now in existence for release of downstream water requirements.

A reduction of forty percent (40%) of the requested amount for Stream Reaches 10, 11, and 12 will be decreed by virtue of two apparent facts from the evidence: 1) an absence of fish statistics to show fish experience or usage on these reaches; and 2) the fact that they are fed from the well protected higher tributaries of the Aesthetic Belt No. 2.

Regarding Stream Reaches 13 and 14, a reduction of sixty percent (60%) of the requested flows will be made for similar reasons.

I am urged to find that sufficient water will remain in the various Stream Reaches for which the United States and the Tribes seek fishery instream flows, after all irrigation diversions, to adequately maintain a fishery in these Reaches and that, therefore, I should find no need to quantify or decree rights to separate instream fishery flows.

It is my belief that the substance of this request is true, and that following this decree and its incremental applications of the reserved rights granted, there will be adequate flows in most if not all of the Reaches that make the granting of an instream flow unnecessary. But this is a final determination of the adjudication of the right to use waters and an instream right is a new concept which cannot be ignored or postponed and deferred on the hope that other users will fall into place. For this reason, the matter was faced and determined in this quantification, as with all of the other claims to the use of water in Division 3.

2. Exclusive Storage Claim

Next, I deal with the right to build storage to serve Indian needs alone. I conclude that this claim must be denied.

Wyoming's Constitution forbids State jurisdiction over Indian lands. Throughout this trial and Report can be found a sustained respect for this Constitutional disclaimer. It is the reason Wyoming has not asked that the Tribes be bound by the still uncancelled State awarded water rights on nearly 87,000 acres of Indian Reservation land.[30]

It is the reason storage construction on Indian land is impossible without the express consent of the Tribes or Congress, their legal guardian. It is the reason State statutes regarding water duties, abandonment, proof of beneficial use, and numerous other matters dealing with land under water use provisions, cannot apply to the Reservation.

This same Wyoming Constitution, which guarantees the immunity from State water law to Indians lands, also ordains that the water in this State is the property of the State of Wyoming and makes no exceptions if said water is traversing Federal enclaves of any kind.

To allow upstream storage and impoundment for exclusive Indian needs, without regard for the thousands of other citizens of Water Division 3 who also have a right to the use of water, would be an unconscionable act.

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[30] The United States, on behalf of the Indians, obtained significant water rights on the Reservation in accordance with Wyoming State law for the irrigation of nearly 145,000 acres. Of that amount, the rights for approximately 58,000 acres have expired for failure to submit evidence of actual use, leaving uncancelled rights for nearly 87,000 acres. A specific identification of all such rights is contained in Plaintiff's Exhibit WRIR SR-8 and SR-9. For reasons set forth in several foregoing sections, the Doctrine of Election of Substantive Rights is not invoked to deny reserved rights to the United States. There is no question that, following the 1905 cession, applications were made to the State Engineer's Office. In fact, the agreement contained specific language that proceeds were to be used in part for preparing Indians and their lands for state awarded water rights. But the action of the Supreme Court, three years later, in the *Winters* case, rendered all such proceedings moot.

Facilities that would assure instream fishing flows in all of the Stream Reaches requested would of course augur well for downstream irrigators, albeit at some expense to irrigators upstream of the fisheries reaches. Facilities with exchange provisions for storage at Boysen Reservoir would largely remove this inequality; but the only way this guaranty of a full instream flow as claimed for fisheries maintenance can ever be accomplished is by the cooperation of all of the water users of Water Division 3, Indian and non-Indian alike, with all government entities involved for rapid construction of the upstream storage facilities.

One last claim, not unrelated to aesthetics and fisheries, is the Tribal request for sufficient water to maintain levels of all lakes on the Reservation "in their natural state" except Bull Lake, Ocean Lake, Boysen Reservoir, Ray Lake, Washakie Reservoir and Pilot Butte Reservoir. This includes water to maintain Washakie Reservoir at 7,000 acree-foot capacity, and Ray Lake at 7,140 acre-foot capacity.

I find no basis in the law or in the evidence which warrants the granting of an implied reserved right for these purposes. While the Tribes are given wide latitude in the use of waters herein awarded, certainly they know that if intense agricultural and other consumptive uses are engaged in to the degree that levels of the lakes are reduced, it is a matter largely in the hands of the Indians to control.

The above findings will be reflected in the decree.

III. ESTOPPEL

One of the contested issues of law herein is whether the United States is estopped from claiming reserved water rights in Water Division 3. It merits a review.

Several thousand defendants, all owners of state water rights that may well be diminished in value in some

degree, feel strongly that the Federal government should compensate them for said damage, or be estopped from asserting this doctrine of reserved rights, particularly for the "futures" acreage of the Wind River Indian Reservation. Many, particularly families of the settlors who were also induced to pioneer the land, feel that at least the reserved rights for future projects should be placed in abeyance until the Federal government completes upstream storage facilities and thus provide the water necessary for the coveted 1868 priority date for the proposed projects, without possible adverse effect upon their state rights.

Of the several hundred attorneys of record with clients as defendants herein, there were two[31] who responded to the call for oral arguments in advancing estoppel; and Wyoming, in briefs and proposed findings, gave the concept thorough coverage. The Copenhaver argument, reduced to its most serious and direct terms, can be paraphrased something like this:

> The United States of America induced and enticed Indians to settle upon the Reservation. The United States of America induced and enticed settlers and pioneers to develop the reclamation areas, the Carey Land Act acreage, and gave the State the right to award water rights. Lives and fortunes were spent to build works and till fields, all on reliance upon those coveted, adjudicated, proven water rights. Men were induced to start their farming operations by the acts and conduct of the United States. The United States should not now be heard to invoke the reserved right date (1868) on Reservation acreage over and above the lands historically irrigated. There was reliance placed upon state water rights by Wyoming settlers who developed those rights. The In-

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[31] Mr. Ross Copenhaver, Tr. p. 14385-92, Worland hearings, December 9, 1981; Mr. George Radosevich, Tr. p. 14392-403, Worland hearings, December 9, 1981.

> dians developed what they could in the histories. New projects should not be given a priority date to the detriment of either the Indian or the non-Indian established rights.

Mr. Radosevich's argument was similar, only it expanded further into the societal and moral field. It stressed the particular vulnerability of Lander, its State Training School, its hospitals—all of equal importance to Indians—if the Tribal claim for groundwater aquifer protection prevails.

I do indeed find that a Federal reserved right does exist and that, from testimony of the 39 Worland witnesses, it would be folly to draw from this finding a conclusion that no matter how gently applied, there would be no injury to existing state awarded water rights owners in the downstream remainder of Water Division 3.[32]

Wyoming and State parties urge that simple notions of fair dealing estop the United States from asserting reserved water rights inconsistent with water rights acquired under Wyoming law. It reminds me again that the United States sought and received state awarded water rights (beginning in 1905 on behalf of the Tribes), and Wyoming maintains that this led residents of Wyoming to believe that the Federal government would not assert any other right.

Wyoming argues that invoking estoppel will not unduly damage the government's normal functioning, nor be of particular damage to the Tribes, for this reason: The State Engineer's office still has on record uncancelled Wyoming water rights for the irrigation of nearly 87,000 acres of Indian Reservation land. It is left to one's sense of balance that if some of these are nullified because the Indians are entitled to a reserved right for

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[32] This finding is reflected in the testimony of Wyoming witness Fassett, and is considered in depth in the section entitled "Effect on State Water Rights", next herein.

the historics (an 1868 priority for about half this acreage), then surely they can live with a 1905 priority date for the balance on the newly proposed projects, a priority date which has served the Riverton Reclamation project well since its inception.

But this line of reasoning must fail, for to recognize it would require the denial of a treaty date priority on virtually all land on which future project acres are located. This would overturn the conclusions set forth under "Boundaries and Dates", *supra*, and that is not appropriate for the reasons and authority cited in that section.

Although my conclusion is firm that damage may indeed result in a lesser degree, depending upon priority dates, to a few senior and territorial water rights holders, and to a larger degree to holders of junior rights, I believe the application of estoppel herein cannot be justified. It would be the imposition of a second wrong to atone for the first. It would be delaying for several more generations the hard truth that the time is now, not to be deferred or argued in court for a century more, to decide once and for all the measured effect of the *Winters* Doctrine in Wyoming.

This conclusion is also obliquely in order because it is Wyoming, not the United States, that has brought this law suit to adjudicate water rights, and they should be determined accordingly now. Neither equitable apportionment, nor estoppel, are remedies open to Wyoming. Having brought this action to quantify the Federal claims, it should proceed to determine that quantification.

It is beyond the referral to even venture a method for the measurement of damages that may result once the decree herein is in place. But it is proper and important to stress that injuries may result, and that the United States is duty bound to compensate those who will be harmed. In my opinion, this harm can be minimized and held to manageable and virtually minimal proportions by

the immediate construction of Blue Holes Reservoir and other relatively modest upstream storage facilities on the main stem of the Wind River.[33] These public works would be welcomed by Indian and non-Indian alike and would inure to the benefit of both entities. For example, the Bureau of Reclamation engineering reveals that Blue Holes Reservoir alone would provide a minimum annual sustained yield of 175,000 acre feet per year, a figure this is virtually enough to serve the entire five new projects containing all of the uncultivated practicably irrigable acres on the entire Reservation. With such a facility in place, there is assurance of virtually no adverse effect upon existing state water users of the Big Horn Basin.

This is dealt with more thoroughly at the end of the next section entitled "Effect on State Water Rights."

For the above reasons, I hold that estoppel is not appropriate in these proceedings.

IV. EFFECT ON STATE WATER RIGHTS

A discussion on effect upon state awarded water rights requires findings dealing with the establishment of those rights. Settlers who applied for and received early permits often perfected their ditches and diversions into adjudicated certificates to assure a source of water. Had they been induced to settle the West by some assurance of water? Is there evidence herein that Congress intended a water source and a system based upon first in time, first in right for said water users? I believe the affirmative is the case with both questions; and I believe that findings and conclusions are in order based largely upon the statutes referred to herein, to the effect that Congress intended and impliedly approved the system adopted

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[33] This point was brought home in dialogue with United States witness Kersich, and with Mr. Merrill and Mr. White and other counsel many times in these proceedings.

in the territory of Wyoming, ratified by statehood which resulted in Water Division 3, and which today finds the owners of water rights in this division about to suffer damage from an inability to put their rights to full use following the implacement of an 1868 priority date for Indians in the upper reaches of the Wind River. The findings are based upon the following facts.

A. ACTS OF CONGRESS

1. The Homestead Act of 1862 first set out conditions for the settlement of unappropriated public lands in the Rocky Mountain West. It was expanded in 1916 by the Stock Raising Homestead Act to include lands previously considered unirrigable but suitable for grazing. I find that in Water Division 3 there are over 132,898 acres which were settled by non-Indians as a result of this legislation, between the years 1890 and 1920.[34]

2. In 1873 Congress passed the Desert Lands Act. This Act supported the recognition by Congress—every bit as impliable as the reserved rights asserted for Indians—that Congress knew water was necessary for the successful settlement of much of the land in the arid West, and further asserted the doctrine of prior appropriation. I find the Desert Land Act resulted in the settlement of approximately 23,590 acres by non-Indians in Water Division 3—mostly between 1916 and 1925.[35]

3. I further find that in the Carey Act of 1894, Congress again recognized the importance of water and the necessity of irrigation for the successful development of arid lands, and outlined a disposal policy which resulted

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[34] Plaintiff's Exhibit DS-6; Tr. p. 11364; Plaintiff's Exhibits WRIR MV-11 and MR-11A; Tr. p. 10510.

[35] Plaintiff's Exhibit DS-12; Tr. p. 11367; also Plaintiff's Exhibit VM-11A.

in the additional settlement by non-Indian settlers of approximately 75,111 acres of land in Water Division 3.[36]

4. I find that the Reclamation Act of 1902 further recognized the necessity of water for settlement in the West, and stated that any project authorized under the Act was to proceed in recognition of state laws concerning water rights. I find that in Water Division 3, over 23,000 acres were disposed of to non-Indians under this Act.[37]

I find that the above Acts of the United States Congress resulted in approximately 255,500 acres of land in Water Division 3 being originally settled upon by the predecessors in interest of the non-Indians of this area.

B. THE WORLAND HEARING

In a system developed over nearly a hundred years and based upon the doctrine of prior appropriation, it is inevitable that the imposition of a priority date earlier than even the Territorial days of Wyoming may have an adverse effect upon the entire body of valid permits and adjudicated certificates. To what degree each is harmed depends first upon its location, upon the quantification of the newly recognized rights, and upon its particular priority.

In litigation of this magnitude, to collect, evaluate and compile facts and data for computerized results to measure and define this adverse effect was a gargantuan task which Wyoming took upon herself to perform, even though it may well have been irrelevant to the legal chore of quantifying the reserved rights. There is no way of knowing how many defendants are involved in this adjudicatory action, nor indeed how many acres are actually affected in this regard. The acres which appear of record

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[36] Plaintiff's Exhibit DS-17.

[37] Plaintiff's Exhibit DS-21; and exhibits cited in above footnotes.

upon the certificates in the State Engineer's Office have been proven in the lawsuit time and again to often vary from the actual acres to which water is applied. But this is a matter which need not be addressed in this portion of the adjudication.

Some 9,000 defendants are on record as holders of approximately 25,000 adjudicated certificates. How many individuals or other entities are the holders of permits can only be surmised. How many ranches carry as a part of their property rights a combination of each is neither required nor known.

Over strong objections from both Tribal and Federal attorneys that such evidence was not only irrelevant, but quite possibly reversible error, I ruled that a small, certain amount of evidence of status diminution and of economic effect would be permissible in this lawsuit. I was guided in that ruling by two considerations: 1) Associate Justice William H. Rehnquist, in *Cappaert, supra*, observed that the application of implied Federal reserved water rights must be done with sensitivity; and 2) the knowledge that if there can be a beginning now to a compilation, entitled to credence, of said adverse effect, it would undoubtedly serve a most valuable purpose to all—Indians and non-Indians, the United States and the State of Wyoming—in the inevitable bargaining, negotiations, planned storage legislation, and strict management procedures that are sure to follow this adjudication.

A total of 39 Wyoming citizens, all residents of Water Division 3 and directly involved herein, were allowed to testify at Worland in December, 1981, during a week reserved for evidence regarding economic impact. Their testimony is immutable proof that an imposition of an 1868 date upon Indian water rights over and above current Indian historic use may have an adverse effect on many appropriators. I so find.

C. THE FASSETT MODEL

In addition, the State employed the professional services of Mr. Gordon W. Fassett, an associate of Leonard Rice Consulting Water Engineers, a registered engineer in at least three Western States, to set up model runs on computers originally developed to handle the entire Big Horn Basin.

Before reviewing the Fassett Model and some of its data base, it is best that I state at the outset exactly what was not concluded from this massive evidence. The "Jeff" Fassett model, as it will become known in Wyoming water law and administration, required over eight days of hearings and filled just over 2,000 pages of the transcript.[38]

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[38] Fassett testimony began at Transcript page 9437 and continued virtually uninterrupted through page 11621. Not all water rights that existed in Water Division 3 were cranked into the data used for the computer printouts (about 80% of acreage was used, Exhibit MF-2), but the number of certificated acres that were included in the data base was an attempt to make the conclusions more acceptable to real world conditions. Generally, the majority of certificates and permits that were left out were those associated with water rights on the uppermost reaches of the stream throughout the Basin; those on smaller draws; those associated with particular springs that would appear on individual lands, which in the opinion and from discussions with Mr. Christopulos, Mr. Fassett and his staff felt should be considered outside the bounds of rigorous administration. This eighty percent figure for the certificated areas was reduced to even sixty-five percent of the permitted areas in all of Water Division 3. As to what Tribal claims, including the contingency claims, should be given credit is not clear and it was admittedly a very difficult job. The Tribes' contingency claim of twenty percent total of all Tribes' claims said nothing about specific points of diversion and therefore, the 130,000 acre-feet involved was divided up among the various points of diversion made by the United States and the Tribes. The model was designed with virgin flows, input developed by engineers or staff under Mr. Fassett's supervision, and virgin flows were estimated near the gaging sites and were not broken down into every single individual stream throughout the Big Horn Basin. Plaintiff's Exhibit MF-4 dealt

The Fassett model was not a basis for any finding of fact or conclusion of law. If it has probative value in this law suit, it is only as a supplemental basis for a finding of fact reported above and for which the Worland witnesses constitute the primary evidence, i.e., that the imposition of an 1868 priority upon Indian acreage over and above historic total, may have an adverse effect upon many state awarded water rights in Water Division 3.

How much of an adverse effect on the junior rights? How much of an effect on territorials? How much of an effect upon rights of users on streams located upstream from the Reservation as compared to those downstream? What adverse effect, if any possible, on streams such as the Greybull and the Shoshone on the north end of Water Division 3, which are remotely associated hydrologically with the headwaters of the Wind River?

These and other questions naturally arise from the myriad doubts that remain from my review of the Jeff Fasset testimony, and of many of the 200 exhibits used in his model presentation.

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with virgin flows statistically from 1970 through 1979, the years to which the model runs were based. In this Report, a permit deals specifically with an uncancelled, unadjudicated and unconfirmed right to use water in Wyoming, and an adjudicated right is referred to as a certificate, or an adjudicated certificate. In the Fassett model, the word permit was a generic term used for both permits and certificates. The model developed several schedules based primarily upon collation of summaries of actual diversion records of ditches able to be obtained throughout the Big Horn River Basin. Some records were good, some records were not very good; but everything was collated that could be found on as many ditches as could be located throughout the Basin, and these records were summarized in their actual monthly diversion amounts. Between comparing both the results of monthly consumptive use studies of his work and of the work of the United States' and the Tribes' experts, and a review of ditch diversion records throughout the Basin, the witness was able to come up with a diversion pattern, month by month, that was applied to every single water right.

The entire Fassett model exercise left me with a distinct feeling that the inputted assumptions were carefully crafted to secure the desired print outs. This is not to say that there was either deception or faultiness within the practice, but it is to observe that conclusions are to be credible only if the hundreds, and in many cases thousands, of assumptions that went into the computer for each conclusion, had a relationship to real world situations. Oftentimes this was not the case, or could not in fact be the case.

The record of Fassett testimony is replete with examples where certain matters were based on "literature", or on the experience of consumption of other towns than on Fort Washakie, for example, for water consumption; that the dry year of the ten year projection was based upon statistics as to become a statistically dry year, rather than actual dry year flow figures.

The "worst, worst scenario" was obviously based upon inputs that did not compensate for the existence of state awarded permits on some 87,000 acres of Reservation land, and the record is not clear whether some or all were excluded; certainly there are state permits on 17,411 acres of the historically irrigated land. This fact, coupled with the assumptions that all Federal and Indian claims would be fully awarded and immediately exercised, put a strong measure of qualification upon the results. Mr. Fassett testified that in his opinion, though he wouldn't stake his life on it since the subject matter itself—since the very nature of the exercise must allow for a five to fifteen percent correction factor, resulted in a total of about 800,000 acre-feet per year being the total Indian requirements under their claims. That figure is higher than can be granted if every adjusted Indian and United States claim granted were to be "optimized", as some experts say in their testimony. The water duties used were often assumed, and in the case of the Riverton Reclamation Project, if the duties used were to apply to the

acreage under permit, the result would be evidence that numerous Wyoming water users are violating Wyoming law for using far in excess of the statutory quantification of one cubic foot for seventy acres permitted.

I could enumerate many more instances which left so much in doubt regarding the credibility, or the degree of effect, rather than credibility, that is to be placed with each of the model print-outs. But again let me stress that this is not to detract from the professionalism and the expertise with which Mr. Fassett and his people completed the difficult task. They engaged in verifications of input, and these were often made. They testified that hand calculations were done with engineering expertise. Logic was verified time and again to assure as best as possible relationships to real world facts.

Perhaps the overriding and lasting value to be accorded the Fassett model is that it is so structured that it can be inputted with any combination of dates, or set of Federal claims, or amounts of Federal water usage. In this way, once such matters as quantified rights, removal of twenty percent contingency claims, and other reductions, are finally adjudicated herein and beyond appeal, then perhaps officials will have available the opportunity to ask proven questions and obtain credible answers to specific unknowns which would then be capable of ready solution.

The purpose of the Fassett model evidence was to buttress the point that state water rights could be adversely affected by the imposition of a federal reserved water right dating back as far as 1868 on all Indian claims if all granted and simultaneously put into effect. That purpose was served.

It is regrettable that another purpose of the computer model print-outs was not achieved. That purpose was that under a set of assumptions involving cooperation of Wyoming officials, the Tribal authorities and the United

States, the quantification of these Tribal rights could have been determined; upstream facilities planned for,[39] and an incremental building program outlined—all of which would have rendered conclusions to prove that all state water rights would thereby have incurred little or no adverse effect in the implantation and establishment of these quantified Indian water rights. It is a comment on the disobliging nature of our times that such an alternative use of this vast and costly exercise was not engaged in.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

In general, I have found that the United States, and to a lesser degree the Tribes, have prevailed with evidence to be more persuasive at most of the significant points in this adjudication. However, particularly regarding the

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[39] A document much "in evidence" at counsel tables of major parties during most of the trial, though not offered in evidence, was a publication of the Department of the Interior, Water and Power Resources Service (Bureau of Reclamation), dealing with upstream storage facilities. Both Wyoming and the United States made a copy available to me. It is entitled, "Wind River Basin Water Supply Study, Preliminary Field Draft, June, 1980." I have based no findings in this Report upon materials in this publication, but I deem it appropriate to cite from it in this section dealing with effects.

The report presented results of studies performed to determine the quantities of water in the Wind River Basin available for storage, potential storage sites, and approximate cost of water storage at each site. All studies were conducted so as to have no adverse effect upon existing water rights. This study dealt with water in addition to water released from Boysen Reservoir. No Boysen releases were shorted to make water available for upstream storage. These studies demonstrated that during periods when Boysen is not full, water could be stored at upstream locations by using an exchange system of storage between Boysen and the upstream sites. This exchange has advantages to all irrigators of Division 3: (1) there are periods when storage is available in Boysen, but cannot be diverted by upstream users due to low flow conditions; and (2) upstream storage would help eliminate periods

proof of practicable irrigability of historic lands, much of the State of Wyoming's position was found to be convincing, as it was on certain points regarding groundwater and additional Tribal futures claims.

Considering the vigor and professional expertise with which the attorneys for Wyoming conducted their case, I believe that only serious and legally meritorious contentions could have survived. To closely examine these contentions, one is referred to the body of this Report, particularly Part II (pages 87 through 217), which deals in detail with practicably irrigable acreage determinations.

As is the custom in complex stream adjudications, Findings of Fact and Conclusions of Law are of necessity determined in the body of the Report, and appear without distinction in summary form listed below. Any ambiguity or omission shall be resolved by first referring to the recommended decree herein, *infra*, and next to the specific section of the Report from which the following findings and conclusions have been summarized. Footnotes tying findings to evidence are also contained in the main sections.

A. BOUNDARIES AND DATES

1. The Wind River Indian Reservation, established by Treaty, July 3, 1868, lies wholly within Water Division 3 of the State of Wyoming, and its boundaries are agreed to by major parties herein. See Appendix 1, *infra*.

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when the Wind River is severely depleted at Riverton due to upstream diversions. Nine potential storage sites were examined with summary results of hydrology, engineering, economics, and environmental matters involved. On-stream sites are designated as Brooks Lake, Blue Holes, Wiggins Reservoir, and Raft Lake. Offstream sites are designated as Ocean Lake, Steamboat, Crowheart Butte, and Kinnear. Blue Holes is the largest of the proposed sites. In its study, a constant release of 14,500 acre-feet per month, or approximately 244 feet per second, was made from the reservoir during the operation study. The firm annual yield would be 174,000 acre-feet, a figure in excess of the totals of the remaining eight projects.

2. The Act of March 3, 1905, amended, modified and ratified the Agreement of April 21, 1904, commonly known as the Second McLaughlin Agreement, between Indian Inspector James McLaughlin on behalf of the United States, and the Shoshone and Arapahoe Tribes. Approximately 1,480,000 acres of Reservation land north of the Wind River and east of the Popo Agie were opened to disposal to non-Indians under the provisions of the homestead, townsite, coal and mineral land laws, or by sale for cash, as provided in the Act. The ceded land is described as follows:

> Beginning in the midchannel of the Big Wind River at a point where said stream crosses the western boundary of the said reservation; thence in a southeasterly direction following the midchannel of the Big Wind River to its conjuction with the Little Wind or Big Popo-Agie River, near the northeast corner of township one south, range four east; thence up the midchannel of the said Big Popo-Agie River in a southwesterly direction to the mouth of the North Fork of the said Big Popo-Agie River; thence up the midchannel of the said North Fork of the Big Popo-Agie River to its intersection with the southern boundary of the said reservation, near the southwest corner of section twenty-one, township two south, range one west; thence due west along the said southern boundary of said reservation to the southwest corner of the same; thence north along the western boundary of said reservation to the place of beginning.

3. By stipulation of the major parties, all of the aforesaid opened land, whether owned by Indians or non-Indians, is recognized as being within the boundaries of the Wind River Indian Reservation.

4. By June 12, 1914, 128,986.56 acres were sold realizing $251,642.97 for the Tribes. On April 29, 1915, the Commissioner of Indian Affairs recommended that fur-

ther sales be postponed indefinitely and, on May 27, 1915, the Secretary of Interior so ordered.

5. On September 19, 1934, the Secretary of Interior temporarily withdrew further disposition of lands within the areas opened by the 1905 Act.

6. Between the opening of the Reservation lands in 1905 and when further disposal of lands was discontinued, proceeds realized by the grazing leases on the opened lands were not treated as general revenues to the United States Treasury but were instead paid to or expended for the benefit of the Indians through Tribal accounts.

7. Indian title to the opened lands was not extinguished until specific plots of land were actually sold or entered, and the Department of the Interior maintained exclusive jurisdiction over grazing on opened lands which were not sold or entered.

8. Article III of the 1905 Act provided that a portion of the proceeds from the sale of opened land would be used to take such steps:

> . . . . as are required by the statutes of the State of Wyoming in securing water rights from said State for the irrigation of such lands as shall remain the property of said Indians, whether located within the territory intended to be ceded by this agreement or within the diminished reserve.

The *Winters* decision of 1908 rendered this language of no legal force or affect regarding securing state water rights. It remains as evidence of intention regarding continued ownership of ceded lands by Indians.

9. On April 17, 1940, the Secretary of the Interior, upon finding that restoration of undisposed, ceded lands to Tribal ownership would be in the Tribal interest, ordered lands not disposed of under the 1905 Act restored to the Wind River Indian Reservation.

10. The "cede, grant and relinquish" language of Article I of the 1905 Act as it related to "all right, title and interest" in the opened lands, when interpreted with the rest of the Act and other contemporary documentation was intended by the Tribes and the United States to give the United States the right to dispose of land by sale or settlement for the benefit of the Tribes, with the United States to act as agent for the Tribes under authority generally associated with a power of attorney. Article IX of the Act established this trusteeship.

11. The extinguishment of Indian property rights must be clearly and plainly provided for by the Congress and cannot be implied. The 1905 Act does not extinguish any right to the boundaries and dates granted under this test.

12. The 1905 Act establishes a trust relationship between the Tribes and the United States, with the United States acting as the trustee for the sale of certain Indian lands to settlers.

13. For Tribal, allotted, or Indian fee land within the stipulated boundaries of the Wind River Indian Reservation which has never left Indian ownership or which has left Indian ownership but which has been reacquired by the Tribes prior to the date of this Report, the date for the purpose of determining priority of water rights is July 3, 1868.

14. For Indian owned fee land awarded a reserved water right herein and reacquired by the Tribes after the date of this Report, the reserved right shall continue in effect.

15. For Tribal and allotted land within the stipulated boundaries of the Wind River Indian Reservation which has left Indian ownership and has been reacquired by the Tribes after the date of this Report, the date for the purpose of determining priority of water rights is the date of issuance of the state awarded water permit on said

after-acquired land, if uncancelled at the time of reacquisition. If cancelled or no state rights are in effect, there are no reserved water rights for said reacquired lands.

16. Land within the Wind River Indian Reservation which has been conveyed to a non-Indian in fee, and which remains titled in non-Indian ownership as of this Report, has no establishment date for purposes of determining priority of water rights.

B. INTENT AND PURPOSES

1. The Treaty of 1868 which created the Wind River Indian Reservation provided that the Reservation be ". . . set apart for the absolute and undisturbed use and occupation of the Shoshonee Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing . . . to admit amongst them . . .", Article II.

2. Article IV of the Treaty provided that the Indians ". . . will make said reservations their permanent home . . ." and Article VI anticipated that they will ". . . desire to commence farming. . . ."

3. Twenty-two years after the Reservation was established, Wyoming was admitted to the Union by an Admission Act passed by Congress on July 10, 1890. Section 1 of that Act confirmed the Wyoming Constitution.

4. Article 8 of the Wyoming Constitution addressed water and the prior appropriate system as follows:

> Article 8, Sec. 1. The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state.
>
> Article 8, Sec. 3. Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests.

5. No provision in the Act of Admission addresses the Treaty of 1868 or the repeal of any provision of that Treaty.

6. Article VII of the Treaty of 1868 sought to "insure the civilization of the tribes entering into this Treaty."

7. Agriculture and related uses and fishing both existed on the Wind River Indian Reservation and contributed to the food base for the Indians during much of the latter half of the nineteenth century.

8. The doctrine of implied reserved rights established by the United States Supreme Court in *Winters* is applicable to the Wind River Indian Reservation and dictates the conclusions herein.

9. Congress, by ratification of the Treaty of 1868, impliedly created a reserved right for water on the Wind River Indian Reservation to satisfy the purposes of that Treaty.

10. At the creation of the Wind River Indian Reservation by the Treaty of Fort Bridger on July 3, 1868, the land within the present stipulated boundaries was vested with a priority date for that reserved right of July 3, 1868.

11. The admission of Wyoming into the Union by the Act of July 10, 1890 did not affect the preexisting implied reserved water rights of the Wind River Indian Reservation.

12. Wyoming's Constitution, which was accepted, ratified and confirmed by Congress upon Wyoming's admission to the Union, did not affect the preexisting reserved water rights of the Wind River Indian Reservation.

13. All Tribal, allotted and Indian owned fee lands located within the stipulated boundaries of the Wind River Indian Reservation that have never left Indian ownership have a priority date of July 3, 1868 upon being proven practicably irrigable acres in this adjudication.

14. All Tribal, allotted and Indian owned fee lands located within the stipulated boundaries of the Wind River Indian Reservation which have left Indian ownership but which have been reacquired by the Tribes prior to the date of this Report have a prority date of July 3, 1868 upon being proven practicably irrigable acres in this adjudication.

15. All Tribal, allotted and Indian owned fee land located within the stipulated boundaries of the Wind River Indian Reservation which has been conveyed to non-Indian ownership in fee and which remains out of Tribal or Indian ownership as of the date of this Report has no reserved water right.

16. All Indian owned fee land awarded a reserved right in this adjudication shall continue to enjoy said right so long as it is owned either by Indians in fee or by the Tribes. Conveyance of said fee lands to non-Indian ownership shall terminate said reserved water right.

17. The Wyoming Supreme Court case of *Merrill v. Bishop* is in harmony with the conclusion that Congress reserved a water right in creating the Wind River Indian Reservation.

18. The respective Treaty provisions of the Fort Belknap Treaty, the subject of *Winters*, and the Treaty of 1868 are so similar as they relate to the reserved rights question that the same congressional intent can be implied for both.

19. The evidence introduced by the State of Wyoming of letters and records of government officials and agents, intended as proof of a lack of congressional intent to reserve water, lacks any chronological perspective to address the question of congressional intent in 1868 and clearly does not meet the burden of persuasion on the subject.

20. The equal footing doctrine does not reach the existence or non-existence of reserved water rights within Wyoming.

21. The principle purpose of Congress in ratifying the Treaty of 1868 was to provide a permanent homeland for the Indians and to establish a permanent civilization on the Wind River Indian Reservation.

22. To provide water for a Wind River Indian Reservation agricultural way of life only, when the Treaty of 1868 provided as above, is to unreasonably limit the terms of the Treaty entered into by a Congress and a nation whose own history surpassed its narrow agricultural beginnings.

23. To accomplish the purpose of the Reservation, Congress impliedly reserved water for agriculture, livestock, fish and wildlife, mineral development, municipal needs, industrial development, and protection and preservation of the aesthetic natural conditions on the Wind River Indian Reservation.

C. HISTORIC LANDS

1. As Applied to Categories of Land

1. The United States' determination of practicably irrigated acreage on the historic claim is generally more experienced, accurate and reliable than that of adversary parties, although the State of Wyoming provided sufficient evidence about certain acreage to warrant a significant reduction of the total claim.

2. The United States began the major presentation of its case with the testimony of Ronald Billstein of H.K.M. Associates. The interpretation of aerial photographs between 1939 and 1979 performed by United States' experts was supplemented and checked by field inspection of every tract claimed as historically in use outside of the Federal Irrigation Projects, and by review of assess-

ment records and delivery system maps within the Federal Irrigation Projects. The testimony of Mr. Billstein was professionally competent, credible and persuasive.

3. On-site hydrographic verification and soils classification on all lands in the historic land base was done under the direction of Albert Kersich, President of H.K.M. Associates. The testimony of Mr. Kersich on all facets of his work was professional, credible and persuasive.

4. The United States presented its case on engineering studies and water requirements in adjudication, unadjudicated issues, and Type VII land claims through the testimony of Thomas Stetson, President of Stetson Engineers. Dr. Woldezion Mesghinna, also of Stetson Engineers, presented similar testimony for the United States concerning the Type III lands claim.

5. The evidence presented by Thomas Stetson and Dr. Mesghinna is more credible and persuasive at most significant points than that introduced in opposition and rebuttal.

6. Excluding the Upper Wind Unit, the average overall efficiency of the Federal Irrigation Projects is thirty-five percent (35%). Historic overall efficiencies on non-project lands also average thirty-five percent (35%).

7. Similar to his analysis of the future projects, United States' economic feasibility expert David Dornbusch performed an economic evaluation of Type VII and VIII lands, determining the economic feasibility of each parcel. The testimony of David Dornbusch was professionally competent, credible and persuasive.

8. Irrigation of Type VII and VIII lands included in the final totals is economically feasible.

9. A benefit/cost ratio, the present value of returns from the land divided by the present value of the costs

necessary to generate those returns, of less than "one" or "unity" indicates economic infeasibility.

10. The irrigation of historic lands in the final totals is clearly feasible.

11. No economic analysis was necessary, nor was one done, on adjudicated or unadjudicated in-use lands.

12. The State's case consisted mainly of review and criticism of the work performed by Federal and Tribal experts and of showing—partially successfully—that work was inadequate.

13. The methodology of United States' witnesses was competent, generally convincing, and in most cases adequate in supporting Federal claims.

14. In considering Type VII land and Indian fee potentially irrigable acres, State economic expert James Jacobs made several assumptions clearly at odds with the reality of presently existing and probable future circumstances in Water Division 3.

15. The testimony of Mr. Jacobs was inadequate to advance the State's claim that the benefit/cost ratios of the historic lands study are below unity.

16. The State of Wyoming presented Craig Sommers' testimony to show successfully that 5,017.1 acres of adjudicated lands were nonarable by United States' standards, but did not prove that water was not being beneficially applied on 12,395 acres.

17. Class 6 lands are not entitled to water rights on the same basis as Class 1 through Class 4 lands.

18. The State's review of evidence presented by the United States' experts showed 3,575.9 acres of Class 6 lands within the unadjudicated in-use claim. Class 6 land is that which does not meet the minimum standards or requirements of arability under the land class stand-

ards used by the Federal experts, and is therefore non-irrigable.

19. The irrigability of another 879 acres of unadjudicated in-use lands was discredited by notes in the logs of Federal experts.

20. The unadjudicated in-use totals included 1,778 acres of subirrigated land, which United States expert Billstein admitted was classified nonarable.

21. State witness Sommers pinpointed 55.6 acres more appropriately typed as idle, or Type VII, land.

22. Two parcels within the unadjudicated in-use claim are owned by non-Indians. They total 10 acres.

23. The 34,527 acres claimed by the United States as unadjudicated in-use, contains 6,298 acres not entitled to a reserved water right, which when deleted from the claim leaves 28,129 acres as the measure of the right in this category.

24. After modifications made during analysis by Federal experts, the United States' benefit/cost analysis at a 4% real rate of interest showed 7,946 acres remaining feasible out of the original Type VII claim of 8,002 acres.

25. There was a general relaxation of standards used by Federal experts in Type VII land classification.

26. The arability conclusions of Federal experts for Type VII lands had deficiencies which warranted subtracting the acres from the final totals.

27. Class 4 and Class 6 Type VII lands are too marginal to be awarded a finding of practicably irrigable, and are excluded from the Final Type VII totals. This exclusion results in the elimination of 1,546 acres from the claim with a total diversion of 7,771 acre-feet.

28. Lands which do not have sufficient depth to water table and consequently classify as wet lands, or lands

which are subirrigated by seepage from adjoining irrigated lands, should not be given consideration as practicably irrigable acreage, and are denied a reserved water right.

29. Type VIII lands are within the boundaries of the Wind River Federal Irrigation Projects in the Upper Wind Unit, the Little Wind Unit and Johnstown Unit.

30. Class 4 and Class 6 Type VIII lands are too marginal to be used as a measure for a reserved right.

31. Type VIII lands and lands claimed within the Owl Creek Unit have attributes comparable to future project lands, and were analyzed in the same manner. Acres which could not be feasibly irrigated from a strictly engineering standpoint and those which would not be economically feasible to develop were eliminated.

32. The broad assertions of Tribe's expert Higgginson regarding Indian fee owned land cannot be given complete credibility. Certain assumptions upon which he based his opinion were not supported on the record. The 10,374 acres he claimed as a measure of the reserved water rights based upon individually owned Indian fee lands is therefore reduced by 4,692 acres to an award of 5,682 acres as the measure of this right.

33. The diversion requirements developed by United States expert Mesghinna and by Tribes expert Higginson are reasonable.

34. Historic diversion rates on the Wind River Indian Reservation are excessive and the efficiencies achieved by irrigators there are poor. Therefore, and in light of all the evidence, an increase of 5% in the overall efficiencies is not unreasonable or overly burdensome. Overall efficiency on the historic lands is thus increased to 40%, and the award herein is based on that figure.

35. The categories of land termed Historic herein include numerous farm fields, many a part of federal irri-

gation projects long established, that are rich and productive and have been the basis of agricultural life of the Reservation for decades. I find that it would be unreasonable to require an economic analysis or benefit-cost ratios on these lands as is required under future irrigation projects. The presumption of irrigability regarding these lands was fair and all parties fairly understood it.

36. There are certain adjudicated historic areas in which the testimony presented by experts for Wyoming succeeded in rebutting the presumption of practicably irrigable acreage, and totals have been reduced accordingly.

2. As Applied to Projects, Canals or River Basins

(a) Little Wind Unit

37. On the Ray Canal, the United States claimed a total 9,926 acres of land as the measure of reserved water, for a total annual diversion of 52,775 acre-feet of water. Of these acres, 514.4 acres were of a class determined by United States' experts to be economically infeasible because of failure to meet the United States' size or arability standards. United States' experts found 4.9 acres Type IX, or "Out" land; 10 acres Type VII, or "Idle" land; 511.9 acres Class 6 land; and 157 acres subirrigated land, all nonarable by their standards. Deleting these 1,198.2 acres from the claim leaves 8,728 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands, and an average water duty of 4.45 acre-feet per acre to Type VIII lands, equals an award of 40,573 acre-feet of water diverted annually from Ray Canal.

38. On the Coolidge Canal, the United States claimed a total 8,029 acres of land as the measure of reserved water, for a total annual diversion of 39,754 acre-feet of water. Of these acres, 233.7 were of a class determined by United States' experts to be economically in-

feasible because of failure to meet the United States' size or arability standards, and 21 acres were of a class determined by United States' economic expert Dornbusch to be economically infeasible. United States' experts found 76 acres Type IX, or "Out" land; 11 acres Type VII, or "Idle" land; 1,196.3 acres Class 6 land; and 66 acres subirrigated land, all nonarable by their standards. Deleting these 1,604 acres from the claim leaves 6,425 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands, and an average water duty of 4.45 acre-feet per acre to Type VIII lands, equals an award of 27,880 acre-feet of water diverted annually from Coolidge Canal.

39. On the Sub Agency Canal, the United States claimed a total 3,468 acres of land as the measure of reserved water, for a total annual diversion of 18,163 acre-feet of water. Of these acres, 16.9 were of a class determined by United States' experts to be economically infeasible because of failure to meet the United States' size or arability standards. United States' experts found 420.4 acres Class 6 land, and 57 acres subirrigated land, all nonarable by their standards, and their logs noted various reasons for the nonarability of another 15.2 acres. Deleting these 509.5 acres from the claim leaves 2,958 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands, and an average water duty of 4.45 acre-feet per acre to Type VIII lands, equals an award of 13,730 acre-feet of water diverted annually from Sub Agency Canal.

40. In summary, in the Little Wind Unit, the United States claimed a total 21,423 acres of land as the measure of reserved water, for a total annual diversion of 110,692 acre-feet of water. Of these acres, 765 were of a class determined by United States' experts to be economically infeasible because of failure to meet the United

States' size or arability standards, and 21 acres were of a class determined by United States expert Dornbusch to be economically infeasible. United States' experts found 80.9 acres Type IX, or "Out" land; 21 acres Type VII, or "Idle" land; 2,128.6 Class 6 land; and 705 acres subirrigated land, all nonarable by their standards, and their logs noted various reasons for the nonarability of another 15.2 acres. Deleting these 3,311.7 acres from the claim leaves 18,111 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands, and an average water duty of 4.45 acre-feet per acre to Type VIII lands, equals an award of 82,183 acre-feet of water diverted annually from the Little Wind Unit.

(b) Upper Wind Unit

41. In the Upper Wind Unit, the United States claimed a 492 acres of land as the measure of reserved water, unspecified as to canal, for an annual diversion of 2,056 acre-feet of water. All of these acres are practicably irrigable Type VIII lands reviewed by Dr. Mesghinna, and award is made for the full amount claimed therefor.

42. On the Wind River "A" Canal, the United States claimed a total 1,118 acres of land as the measure of reserved water, for a total annual diversion of 13,483 acre-feet of water. Of these acres, 39.6 were of a class determined by United States' experts to be economically infeasible because of failure to meet the United States' size or arability standards. United States' experts found 19.1 acres Class 6 land, nonarable by their standards, and their logs noted various reasons for the nonarability of another 115.4 acres. Deleting these 174.1 acres from the claim leaves 944 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use

and Type VII lands equals an award of 9,959 acre-feet of water diverted annually from Wind River "A" Canal.

43. On the Dinwoody Canal, in the Dinwoody Bench Area, the United States claimed a total 5,496 acres of land as the measure of reserved water, for a total annual diversion of 66,281 acre-feet of water. United States' experts found 37 acres Type IX, or "Out" land; and 705 acres subirrigated land, all nonarable by their standards, and their logs noted various reasons for the nonarability of another 28 acres. States' expert Sommers noted ten acres of adjudicated land on Dinwoody Canal that are more properly typed "VIII". Deleting these 780 acres from the claim leaves 4,716 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands equals an award of 49,754 acre-feet of water diverted annually from the Dinwoody Bench Area.

44. In summary, in the Upper Wind Unit, the United States claimed a total 7,106 acres of land as the measure of reserved water, for a total annual diversion of 81,820 acre-feet of water. Of these acres, 39.6 were of a class determined by United States' experts to be economically infeasible because of failure to meet the United States' size or arability standards. United States' experts found 37 acres Type IX, or "Out" land; 19.1 acres Class 6 land; and 705 acres subirrigated land, all nonarable by their standards, and their logs noted various reasons for the nonarability of another 143.4 acres. State expert Sommers noted ten acres of adjudicated land on Dinwoody Canal that are more properly typed "VIII". Deleting these 954.1 acres from the claim leaves 6,152 acres as a measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use, and Type VII lands, and an average water duty of 4.45 acre-feet per acre to Type

VIII lands, equals an award of 61,769 acre-feet of water diverted annually from the Upper Wind Unit.

(c) Separate Units

45. In the Johnstown Unit, the United States claimed a total 844 acres of land as the measure of reserved water, for a total annual diversion of 5,490 acre-feet of water. Of these acres, 138 were of a class determined by United States' experts to be economically infeasible because of failure to meet the United States' size or arability standards. United States' experts found 38.9 acres Class 6 land, nonarable by their standards. Deleting these 176.9 acres from the claim leaves 667 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands, and an average water duty of 4.45 acre-feet per acre to Type VIII lands, equals an award of 3,837 acre-feet of water diverted annually from the Johnstown Unit.

46. In the Lefthand Unit, the United States claimed a total 2,148 acres of land as the measure of reserved water, for a total annual diversion of 14,821 acre-feet of water. Of these acres, 136.2 were of a class determined by United States' experts to be economically infeasible because of failure to meet the United States' size or arability standards. United States' experts found 12 acres Type IX, or "Out" land; 1 acre Type VII, or "Idle" land; and 789.7 acres Class 6 land, all nonarable by their standards, and their logs noted various reasons for the nonarability of another 4 acres. Deleting these 942.9 acres from the claim leaves 1,205 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands equals an award of 7,267 acre-feet of water diverted annually from the Lefthand Unit.

(d) Irrigation Districts

47. In the Midvale Irrigation District, the United States claimed a total 569 acres of land as the measure of reserved water, for a total annual diversion of 3,175 acre-feet of water. Eight of these acres are owned by non-Indians, and when deleted from the claim leave 561 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands equals an award of 2,738 acre-feet of water diverted annually from the Midvale Irrigation District.

48. In the Riverton-LeClair Irrigation District, the United States claimed a total 1,371 acres of land as the measure of reserved water, for a total annual diversion of 7,513 acre-feet of water. O fthese acres, 9.6 were of a class determined by United States' experts to be economically infeasible because of failure to meet the United States' size or arability standards. United States' experts found 93.7 acres Class 6 land, nonarable by their standards, and their logs noted various reasons for the nonarability of another 201.6 acres. Deleting these 304.9 acres from the claim leaves 1,066 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands equals an award of 5,117 acre-feet of water diverted annually from the Riverton-LeClair Irrigation District.

(e) Project Land Totals

49. In totaling the above summaries in project lands, the United States claimed a total 33,461 acres of land as the measure of reserved water, for a total annual diversion of 223,511 acre-feet of water. Of these acres, 1,088.4 were of a class determined by United States' experts to be economically infeasible because of failure to meet the United States' size or arability standards, and 21 acres were of a class determined by United States

expert Dornbusch to be economically infeasible. United States' experts found 129.9 acres Type IX, or "Out" land; 22 acres Type VII, or "Idle" land; 3,070 acres Class 6 land; and 985 acres subirrigated land, all nonarable by their standards, and their logs noted various reasons for the nonarability of another 364.2 acres. Eight acres are owned by non-Indians. State expert Sommers noted ten acres of adjudicated land on Dinwoody Canal that are more properly typed "VIII". Deleting these 5,698.5 acres from the claim leaves 27,762 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands, and an average water duty of 4.45 acre-feet per acre to Type VIII lands, equals an award of 162,911 acre-feet of water diverted from the project canals.

(f) Non-Project Lands

50. Outside of the Project areas, the historic land claims fall into five areas, the Wind River Basin, the Little Wind River Basin, the Bighorn River Basin, the Popo Agie River Basin, and the Owl Creek Basin.

51. The streams serving lands within the Wind River Basin are: East Fork Wind River, Dinwoody Creek, Sand Draw, Dry Creek, Bull Lake Creek, Meadow Creek, Dry Pasup Creek, Crow Creek, Willow Creek, and the Main Stem of the Wind River.

52. The streams serving lands within the Little Wind River Basin are: North Fork Little Wind River, South Fork Little Wind River, Main Stem Little Wind River, Mill Creek, Sage Creek, Crooked Creek, Trout Creek, Spring Creek, and Bighorn Draw.

53. The streams serving lands within the Bighorn River Basin are the Main Stem of the Bighorn River, Cottonwood Creek, Fivemile Creek, and Muddy Creek.

54. Land within the Popo Agie River Basin is served by the North Fork and the Main Stem of the Popo Agie River.

55. Within the Owl Creek Basin, the land is served by the South Fork of C vl Creek, the main stem of Owl Creek, Mud Creek and Red Creek, Dry Muddy Creek, Maverick Springs Draw, and Roundup or Warm Springs.

(g) Wind River Basin

56. On the East Fork of the Wind River, the United States claimed a total 310 acres of land as the measure of reserved water, for a total annual diversion of 1,568 acre-feet of water. Of these acres, 41 were of a class determined by United States' experts to be economically infeasible because of failure to meet the United States' size or arability standards. United States' experts found 9 acres Type VII, or "Idle" land, nonarable by their standards, and their logs noted var ous reasons for the nonarability of another 228.3 acres. Deleting these 278.3 acres from the claim leaves 32 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands equal an award of 141 acre-feet of water diverted annually from the East Fork of the Wind River.

57. On Dinwoody Creek, the United States claimed a total 171 acres of land as the measure of reserved water, for a total annual diversion of 953 acre-feet of water. United States' experts found 36.9 acres Type IX, or "Out" land, nonarable by their standards. Deleting these 36.9 acres from the claim leaves 134 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands equals an award of 649 acre-feet of water diverted annually from Dinwoody Creek.

58. On Sand Creek, the United States and the Tribes made no claim and, therefore no water is awarded.

59. On Dry Creek, the United States and the Tribes claimed a total 1,739 acres of land as the measure of reserved water, for a total annual diversion of 7,741 acre-feet of water. Of these acres, 3.5 were of a class determined by United States' experts to be economically infeasible because of failure to meet the United States' size or arability standards, and their logs noted various reasons for the nonarability of another 150.9 acres. Tribal expert Higginson determined 312 acres of Indian fee land to be "potentially irrigable", but insufficient showing was made that comparable acreage had been successfully irrigated. Deleting these 466.4 acres from the claim leaves 1,273 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands, and an average water duty of 4.57 acre-feet per acre to Indian owned lands, equals an award of 5,584 acre-feet of water diverted annually from Dry Creek.

60. On Bull Lake Creek, the United States claimed a total 63 acres of land as the measure of reserved water, for a total annual diversion of 339 acre-feet of water. All of these acres are practicably irrigable and are awarded status as a measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands equals an award of 296 acre-feet of water diverted anually from Bull Lake Creek.

61. On Meadow Creek, the United States and the Tribes claimed a total of 683 acres of land as the measure of reserved water, for a total annual diversion of 3,477 acre-feet of water. United States' experts found 3.5 acres Class 6 land, nonarable by their standards, and their logs experts noted various reasons for the nonarability of another 10 acres. Deleting these 13.5 acres from the

claim leaves 680 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands, and an average water duty of 4.57 to Indian owned lands, equals an award of 3,125 acre-feet of water diverted annually from Meadow Creek.

62. On Dry Pasup Creek, the United States claimed a total 2,148 acres of land as the measure of reserved water, for a total annual diversion of 11,370 acre-feet of water. Of these acres, 77.2 were of a class determined by United States' experts to be economically infeasible because of failure to meet the United States' size or arability standards. United States' experts found 74 acres Type IX or "Out" land, and 267 acres Type VII, or "Idle" land, all nonarable by their standards, and their logs noted various reasons for the nonarability of another 180 acres. Deleting these 598.2 acres from the claim leaves 1,550 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands equals an award of 7,179 acre-feet of water diverted annually from Dry Pasup Creek.

63. On Crow Creek, the United States claimed a total 3,117 acres of land as the measure of reserved water, for a total annual diversion of 16,551 acre-feet of water. Of these acres, 31.1 were of a class determined by United States' experts to be economically infeasible because of failure to meet the United States' size or arability standards. United States' experts found 180 acres Type VII, or "Idle" land, and 401.1 acres Class 6 land, all nonarable by their standards. Deleting these 612.2 acres from the claim leaves 2,505 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands equals an award of 11,646 acre-feet of water diverted annually from Crow Creek.

64. On Willow Creek, the United States and the Tribes claimed a total 243 acres of land as the measure of reserved water, for a total annual diversion of 1,136 acre-feet of water. United States' experts found 2 acres Type VII, or "Idle" land, and 6.5 acres Class 6 land, all nonarable by their standards, and their logs noted various reasons for the nonarability of another 41 acres. Deleting these 49.5 acres from the claim leaves 194 acres as the measure of the right. Applying a 40% overal efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands, and an average water duty of 4.57 acre-feet per acre to Indian owned lands, equals an award of 876 acre-feet of water diverted annually from Willow Creek.

65. On the Main Stem of the Wind River, the United States and the Tribes claimed a total 7,784 acres of land as the measure of reserved water, for a total annual diversion of 36,985 acre-feet of water. United States' experts found 17.2 acres Type IX, or "Out" land, 31 acres Type VII, or "Idle" land, and 379.3 acres Class 6 land, all nonarable by their standards. Tribal expert Higginson determined 2,912 acres of Indian fee land to be "potentially irrigable", but insufficient showing was made that comparable acreage had been successfully irrigated. Two acres are owned by non-Indians. Deleting these 3,341.5 acres from the claim leaves 4,442 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands, and an average water duty of 4.57 acre-feet per acre to Indian owned lands, equals an award of 20,842 acre-feet of water diverted annually from the Main Stem of the Wind River.

66. In sumary, in the Wind River Basin, the United States claimed a total 16,258 acres of land as the measure of reserved water, for a total annual diversion of 80,120 acre-feet of water. Of these acres, 152.8 were of a class determined by United States' experts to be economically

infeasible because of failure to meet the United States' size or arability standards. United States' experts found 128.1 acres Type IX, or "Out" land; 489 acres Type VII, or "Idle" land; and 790.4 acres Class 6 land, all nonarable by their standards, and their logs noted various reasons for the nonarability of another 610.2 acres. Two acres are owned by non-Indians. Tribal expert Higginson determined 3,224 acres of Indian fee land to be "potentially irrigable, but insufficient showing was made that comparable acreage had been successfully irrigated. Deleting these 5,396.5 acres from the claim leaves 10,873 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands, and an average water duty of 4.57 acre-feet per acre to Indian owned fee lands, equals an award of 50,338 acre-feet of water diverted annually from the Wind River Basin.

(h) Little Wind River Basin

67. On the North Fork of the Little Wind River, the United States and the Tribes claimed a total 2,984 acres of land as the measure of reserved water, for a total annual diversion of 15,325 acre-feet of water. Of these acres, 254.9 were of a class determined by United States' experts to be economically infeasible because of failure to meet the United States' size or arability standards. United States' experts found 48.4 acres Class 6 land, and 600 acres subirrigated land, all nonarable by their standards, and their logs noted various reasons for the nonarability of another 332.9 acres. Tribal expert Higginson determined 36 acres of Indian fee land to be "potentially irrigable", but insufficient showing was made that comparable acreage had been successfully irrigated. Deleting these 1,272.2 acres from the claim leaves 1,712 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands, and an average water duty of 4.57 to Indian owned lands, equals

an award of 7,961 acre-feet of water diverted annually from the North Fork of the Little Wind River.

68. On the South Fork of the Little Wind River, the United States and the Tribes claimed a total of 1,402 acres of land as the measure of reserved water, for a total annual diversion of 6,977 acre-feet of water. Of these acres, 85.7 were of a class determined by United States' experts to be economically infeasible because of failure to meet the United States' size, or arability standards. United States' experts found 186 acres subirrigated land, nonarable by their standards and their logs noted various reasons for the nonarability of another 11 acres. Tribal expert Higginson determined 7 acres of Indian fee land to be "potentially irrigable," but insufficient showing was made that comparable acreage had been successfully irrigated. Deleting these 289.7 acres from the claim leaves 1,113 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands, and an average water duty of 4.57 acre-feet per acre to Indian owned lands, equals an award of 5,085 acre-feet of water diverted annually from the South Fork of the Little Wind River.

69. On the Main Stem of the Little Wind River, the United States and the Tribes claimed a total 1,987 acres of land as the measure of reserved water, for a total annual diversion of 10,856 acre-feet of water. Of these acres, 95.5 were of a class determined by United States' experts to be economically infeasible because of failure to meet the United States' size or arability standards. The logs of United States' experts noted various reasons for the nonarability of 64 acres. Tribal expert Higginson determined 208 acres of Indian fee land to be "potentially irrigable", but insufficient showing was made that comparable acreage had been successfully irrigated. Deleting these 367.5 acres from the claim leaves 1,620 acres as the measure of the right. Applying a 40% over-

all efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands, and an average water duty of 4.57 acre-feet per acre to Indian owned lands, equals an award of 8,177 acre-feet feet of water diverted annually from the Main Stem of the Little Wind River.

70. On Mill Creek, the United States claimed a total 47 acres of land as the measure of reserved water, for a total annual diversion of 262 acre-feet of water. Of these acres, 9.7 were of a class determined by United States' experts to be economically infeasible because of failure to meet the United States' size or arability standards. United States' experts found 9 acres Type VII, or "Idle" land, nonarable by their standards. Deleting these 18.7 acres from the claim leaves 28 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands equals an award of 136 acre-feet of water diverted annually from Mill Creek.

71. On Sage Creek, the United States and the Tribes claimed a total 2,159 acres of land as the measure of reserved water, for a total annual diversion of 11,690 acre-feet of water. United States' experts found 21.6 acres Type IX, or "Out" land; 17 acres Type VII, or "Idle" land; and 27.4 acres Class 6 land, all nonarable by their standards, and their logs noted various reasons for the nonarability of another 84.5 acres. Tribal expert Higginson determined 212 acres of Indian fee land to be "potentially irrigable", but insufficient showing was made that comparable acreage had been successfully irrigated. Deleting these 362.5 acres from the claim leaves 1,797 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands, and an average water duty of 4.57 acre-feet per acre to Indian owned lands, equals an award of 8,686 acre-feet of water diverted annually from Sage Creek.

72. On Crooked Creek, the United States claimed a total 72 acres of land as the measure of reserved water, for a total annual diversion of 380 acre-feet of water. Of these acres, 2.6 were of a class determined by United States' experts to be economically infeasible because of failure to meet the United States' size or arability standards. Deleting these 2.6 acres from the claim leaves 69 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands equals an award of 317 acre-feet of water diverted annually from Crooked Creek.

73. On Trout Creek, the United States and the Tribes claimed a total 291 acres of land as the measure of reserved water, for a total annual diversion of 1,567 acre-feet of water. Of these acres, 63 were of a class determined by United States' experts to be economically infeasible because of failure to meet the United States' size or arability standards. Deleting these 63 acres from the claims leaves 228 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands equals an award of 1,088 acre-feet of water diverted annually from Trout Creek.

74. On Spring Creek, the United States claimed a total 178 acres of land as the measure of reserved water, for a total annual diversion of 885 acre-feet of water. All of these acres are practicably irrigable and are awarded status as a measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands equals an award of 773 acre-feet of water diverted annually from Spring Creek.

75. On Bighorn Draw, the United States claimed a total 139 acres of land as the measure of reserved water, for a total annual diversion of 687 acre-feet of water. All of these acres are practicably irrigable and are

awarded status as a measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands equals an award of 600 acre-feet of water diverted annually from Bighorn Draw.

76. In summary, in the Little Wind River Basin, the United States claimed a total 9,259 acres of land as the measure of reserved water, for a total annual diversion of 48,629 acre-feet of water. Of these acres, 511.4 were of a class determined by United States' experts to be economically infeasible because of failure to meet the United States' size or arability standards. United States' experts found 21.6 acres Type IX, or "Out" land; 26 acres Type VII, or "Idle" land; 75.8 acres Class 6 land; and 786 acres subirrigated land, all nonarable by their standards, and their logs noted various reasons for the nonarability of another 492.4 acres. Tribal expert Higginson determined 463 acres of Indian fee land to be "potentially irrigable", but insufficient showing was made that comparable acreage had been successfully irrigated. Deleting these 2,376.2 acres from the claim leaves 6,884 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands, and an average water duty of 4.57 acre-feet per acre to Indian owned lands, equals an award of 32,823 acre-feet of water diverted annually from the Little Wind River Basin.

(i) Bighorn River Basin

77. On the Main Stem of the Bighorn River, the United States and the Tribes claimed a total 126 acres as the measure of reserved water, for a total annual diversion of 749 acre-feet of water. United States' experts found 11 acres Type VII, or "Idle" land, and 61 acres Class 6 land, all nonarable by their standards. Deleting these 72 acres from the claim leaves 54 acres as the measure of the right. Applying a 40% overall efficiency to the

claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands, and an average water duty of 4.57 acre-feet per acre to Indian owned lands, equals an award of 280 acre-feet of water diverted annually from the Main Stem of the Bighorn River.

78. On Cottonwood Creek, the United States claimed a total 942 acres of land as the measure of reserved water, for a total annual diversion of 5,368 acre-feet of water. Of these acres, 47.7 were of a class determined by United States' experts to be economically infeasible because of failure to meet the United States' size or arability standards. United States' experts found 14.7 acres Type IX, or "Out" land, 58 acres Type VII land, or "Idle" land, and 10 acres Class 6 land, all nonarable by their standards, and their logs noted various reasons for the nonarability of another 122 acres. Deleting these 252.4 acres from the claim leaves 689 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands equals an award of 3,548 acre-feet of water diverted annually from Cottonwood Creek.

79. On Fivemile Creek, the United States claimed a total 518 acres of land as the measure of reserved water, for a total annual diversion of 2,885 acre-feet of water. United States' experts found 95.3 acres Class 6 land, nonarable by their standards. Deleting these 95.3 acres from the claim leaves 423 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands equals an award of 2,055 acre-feet of water diverted annually from Fivemile Creek.

80. On Muddy Creek, the United States claimed a total 4,281 acres of land as the measure of reserved water, for a total annual diversion of 23,485 acre-feet of water. Of these acres, 1.9 were of a class determined by United States' experts to be economically infeasible because of failure to meet the United States' size or

arability standards. United States' experts found 10 acres Type IX, or "Out" land, 143 acres Type VII, or "Idle" land, and 832.4 acres Class 6 land, all nonarable by their standards. Deleting these 987.3 acres from the claim leaves 3,293 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands equals an award of 15,819 acre-feet of water diverted annually from Muddy Creek.

81. On Dry Creek and Maverick Creek, the Tribes claimed a total of 371 acre-feet of water, with no supporting measuring acreage. Insufficient basis for this claim was shown, thus no award is made in this instance.

82. On Roundup or Warm Springs, the Tribes claimed a total 135 acres of land as the measure of reserved water, for a total annual diversion of 249 acre-feet of water. Tribal expert Higginson determined 100 acres of Indian fee land to be "potentially irrigable", but insufficient showing was made that comparable acreage had been successfully irrigated. Deleting these 100 acres from the claim leaves 35 acres as the measure of the right. Applying an average water duty of 4.57 acre-feet per acre for Indian lands to this claim equals an award of 153 acre-feet of water diverted annually from Roundup or Warm Springs.

83. In summary, in the Bighorn River Basin, the United States claimed a total 6,002 acres of land as the measure of reserved water, for a total annual diversion of 33,107 acre-feet of water. Of these acres, 49.6 were of a class determined by United States' experts to be economically infeasible because of failure to meet the United States' size or arability standard. United States' experts found 24.7 acres Type IX, or "Out" land; 212 acres Type VII, or "Idle" land; and 998.7 acres Class 6 land, all nonarable by their standards, and their logs noted various reasons for the nonarability of another

122 acres. Tribal expert Higginson determined 100 acres of Indian fee land to be "potentially irrigable", but insufficient showing was made that comparable acreage had been successfully irrigated. Deleting these 1,507 acres from the claim leaves 4,494 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands, and an average water duty of 4.57 acre-feet per acre to Indian owned lands, equals an award of 21,855 acre-feet of water diverted annually from the Bighorn River Basin.

(j) Popo Agie River Basin

84. On the North Fork of the Popo Agie River, the Tribes claimed a total 534 acres of land as the measure of reserved water, for a total annual diversion of acre-feet of water. Of these acres, 14.1 were of a class determined by United States' experts to be economically infeasible because of failure to meet the United States' size or arability standards. United States' experts found 42 acres Type IX, or "Out" land; 1 acre Type VII, or "Idle" land; and 5 acres Class 6 land, all nonarable by their standards. Deleting these 62.1 acres from the claim leaves 472 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands, and an average water duty of 4.57 acre-feet per acre to Indian owned lands, equals an award of 2,231 acre-feet of water diverted annually from the North Fork of the Popo Agie River.

85. On the Main Stream of the Popo Agie River, the United States and the Tribes claimed a total 134 acres of land as the measure of reserved water, for a total annual diversion of 736 acre-feet of water. United States' experts found 8.9 acres Type IX, or "Out" land; 27.3 acres Class 6 land; and 7 acres subirrigated land, all nonarable by their standards. Tribal expert Higgin-

son determined 20 acres of Indian fee land to be "potentially irrigable", but insufficient showing was made that comparable acreage had been successfully irrigated. Deleting these 63.2 acres from the claim leaves 71 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands, and an average water duty of 4.57 acre-feet per acre to Indian owned lands, equals an award of 347 acre-feet of water diverted annually from the Main Stem of the Popo Agie River.

86. In summary, in the Popo Agie River Basin, the United States and the Tribes claimed a total 668 acres of land as the measure of reserved water, for a total annual diversion of 3,623 acre-feet of water. Of these acres, 24.8 were of a class determined by United States' experts to be economically infeasible because of failure to meet the United States' size or arability standard. United States' experts found 50.9 acres Type IX, or "Out" land; 1 acre Type VII, or "Idle" land; 32.3 acres Class 6 land; and 7 acres subirrigated land, all nonarable by their standards. Tribal expert Higginson determined 20 acres of Indian fee land to be "potentially irrigable", but insufficient showing was made that comparable acreage had been successfully irrigated. Deleting these 125.3 acres from the claim leaves 543 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands, and an average water duty of 4.57 acre-feet per acre to Indian owned lands, equals an award of 2,578 acre-feet of water diverted annually from the Popo Agie River Basin.

(k) Owl Creek Basin

87. On the South Fork of Owl Creek, the United States claimed a total 2,013 acres of land as the measure of reserved water, for a total annual diversion of 10,519

acre-feet of water. Of these acres, 12.9 were of a class determined by United States' experts to be economically infeasible because of failure to meet the United States' size or arability standards. United States' experts found 281.3 acres Type IX, or "Out" land; 32 acres Type VII, or "Idle" land; and 688.9 acres Class 6 land, all nonarable by their standards. Delteing these 1,015.1 acres from the claim leaves 998 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands, and an average water duty of 4.45 acre-feet per acre to Type VII lands, equals an award of 4,455 acre-feet of water diverted annually from the South Fork of Owl Creek.

88. On the Main Stem of Owl Creek, the United States and the Tribes claimed a total 2,875 acres of land as the measure of reserved water, for a total annual diversion of 15,212 acre-feet of water. United States' experts found 246.3 acres Type IX, or "Out" land; 28 acres Type VII, or "Idle" land; and 499.4 acres Class 6 land, all nonarable by their standards. Tribal expert Higginson determined 32 acres of Indian fee land to be "potentially irrigable", but insufficient showing was made that comparable acreage had been successfully irrigated. Deleting these 805.7 acres from the claim leaves 2,069 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands, and an average water duty of 4.57 acre-feet per acre to Indian owned lands, equals an award of 9,775 acre-feet of water diverted annually from the Main Stem of Owl Creek.

89. On Mud Creek, the United States claimed a total 979 acres of land as the measure of reserved water, for a total annual diversion of 5,288 acre-feet of water. Of these acres, 11.9 were of a class determined by United States' experts to be economically infeasible because of

failure to meet the United States' size or arability standards. United States' experts found 74.6 acres Type VII, or "Idle" land, and 125.7 acres Class 6 land, all nonarable by their standards. Deleting these 212.2 acres from the claim leaves 766 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated inuse and Type VII lands equals an award of 3,620 acre-feet of water diverted annually from Mud Creek.

90. On Red Creek, the Tribes claimed a total 104 acres of land as the measure of reserved water, for a total annual diversion of 453 acre-feet of water. Tribal expert Higginson determined 104 acres of Indian fee land to be "potentially irrigable", but insufficient showing was made that comparable acreage had been sucessfully irrigated. Deleting these 104 acres from the claim leaves —0— acres as the measure of the right, and no award is made therefor.

91. In summary, in the Owl Creek Basin, the United States and the Tribes claimed a total 5,971 acres of land as the measure of resereved water, for a total annual diversion of 31,472 acre-feet of water. Of these acres, 24.8 were of a class determined by United States' experts to be economically infeasible because of failure to meet the United States' size or arability standards. United States' experts found 527.6 acres Type IX, or "Out" land; 134.6 acres Type VII, or "Idle" land; and 1,314 acres Class 6 land, all nonarable by their standards. Tribal expert Higignson determined 136 acres of Indian fee land to be "potentially irrigable", but insufficient showing was made that comparable acreage has been successfully irrigated. Deleting these 2,137 acres from the claim leaves 3,833 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated inuse and Type VII lands, an average water duty of 4.45 acre-feet per acre to Type VIII lands, and an average

water duty of 4.57 acre-feet per acre to Indian owned lands, equals an award of 17,850 acre-feet of water diverted annually from the Owl Creek Basin.

(1) Non-Project Land Totals

92. In totaling the above summaries, in the non-project lands, the United States and the Tribes claim a total 38,158 acres of land as the measure of reserved water, for a total annual diversion of 196,951 acre-feet of water. Of these acres, 752.7 were of a class determined by United States' experts to be economically infeasible because of failure to meet the United States' size or arability standards. United States' experts found 752.9 acres Type IX, or "Out" land; 862.6 acres Type VII, or "Idle" land; 3,211.2 acres Class 6 land; and 793 acres subirrigated land, all nonarable by their standards, and their logs noted various reasons for the nonarability of another 1,224.6 acres. Two acres are owned by non-Indians. Tribal expert Higginson determined 3,943 acres of Indian fee land to be "potentially irrigable", but insufficient showing was made that comparable acreage had been successfully irrigated. Deleting these 11,542 acres from the claim leaves 26,627 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands, an average water duty of 4.45 acre-feet per acre to Type VIII lands, and an average water duty of 4.57 acre-feet per acre to Indian owned fee lands, equals an award of 125,444 acre-feet of water directed annually from the river basins.

93. The United States and Tribes seek a reserved water right for land known as the Arapahoe Ranch and the Padlock Ranch. The reserved right priority date sought is the date of acquisition of these lands. All these parcels of land are outside of the stipulated Reservation boundaries. There is no evidence of a Congressional Act or

Executive Order establishing a reservation of the lands of the Arapahoe Ranch and the Padlock Ranch purchases.

94. A reserved water right can only be granted upon acreage which is contained within the boundaries that have been stipulated by parties hereto as the boundaries of the Wind River Indian Reservation. For this reason the claim for a reserved water right for the Arapahoe Ranch and Padlock Ranch acreage is denied. This denial in no way affects the United States' right to the use of water on the ranches pursuant to existing certificates of appropriation or uncancelled permits issued by the State of Wyoming upon which the United States or the Tribes elect to rely.

3. Recapitulation

95. A recapituation of the foregoing findings on all categories of Historic Lands, including Indian fee land, is as follows:

96. The United States and the Tribes claim an overall total of 71,619 acres of land as the measure of reserved water, for a total annual diversion of 420,462 acre-feet of water. Of these acres, 1,841.1 were of a class determined by United States' experts to be economically infeasible because of failure to meet the United States' size or arability standards, and 21 acres were of a class determined by United States expert Dornbusch to be economically infeasible. United States' experts found 882.8 acres Type IX, or "Out" land; 884.6 acres Type VII, or "Idle" land; 6,281.2 acres Class 6 land; and 1,778 acres subirrigated land, all nonarable by their standards, and their logs noted various reasons for the nonarability of another 1,588.8 acres. Ten acres are owned by non-Indians. State expert Sommers noted ten acres of adjudicated land on Dinwoody Canal that are more properly typed "VIII". Tribal expert Higginson determined 3,943 acres of Indian fee land to be "potentially irrigable", but insufficient showing was made that

comparable acreage had been successfully irrigated. Deleting these 17,240.5 acres from the claim leaves 54,389 acres as the measure of the right. Applying a 40% overall efficiency to the claimed diversion requirement on adjudicated, unadjudicated in-use and Type VII lands, an average water duty of 4.45 acre-feet per acre to Type VIII lands, and an average water duty of 4.57 acre-feet per acre to Indian owned lands, equals an award of 288,355 acre-feet of water diverted annually from both the project canals and the non-project river basins.

D. FUTURE LANDS

1. The reservation of water for the Wind River Indian Reservation was intended to satisfy the future needs of the Indians as well as the present needs by granting sufficient water to irrigate future projects constructed on practicably irrigable acreage or use of the same as the measure of said future needs.

2. A land classification and drainage investigation was conducted on the Wind River Indian Reservation by HKM Associates on undeveloped future lands under the direction and control of A. T. Kersich. Mr. Kersich is President of HKM and principal in charge of its water resources section. He has had considerable experience in arable land studies on other Indian reservations and testified as a similar project leader and expert witness for the United States in *Arizona v. California*, where his testimony formed one basis for the Master's opinion. I find Mr. Kersich to be a qualified and credible expert in the areas of his testimony.

3. The "future" lands lie outside the boundaries of the Wind River Federal Irrigation Project, the Midvale Irrigation District, and the LeClair Irrigation District Project, and have no history of irrigation. They are all located within the stipulated boundaries of the Wind River Indian Reservation.

4. The State of Wyoming presented two witnesses to contest the methods and conclusions of the HKM soils experts. The first of these was Clarence Fowkes, who was admitted as an expert in soils science. The second was Craig Sommers, who was admitted as a soils scientist and an agronomist.

5. One addition of PIAs (practicably irrigable acres) was stipulated to by the United States, the Tribes and the State of Wyoming to be "those acres susceptible to sustained irrigation at reasonable costs".

6. The Tribes contended that a separate second test for practicably irrigable acreage is whether the lands in question and the proposed irrigation projects are similar to other lands and projects actually in operation in the West which have sustained long term irrigation. As to the five project areas presented by the United States being feasible, I find it unnecessary to consider the second test of the Tribes given my findings and conclusions regarding arability, irrigability, and economic via benefit-cost analysis, altogether a much stronger first test.

7. The land classificaton and drainage study conducted by the United States included soil analysis, drainage investigation, topographical and geological considerations, climate data, water availability determination, cropping patterns, and irrigation system designs. The land classification standards developed were applied both to lands susceptible of gravity irrigation and to lands capable of sprinkler irrigation.

8. The claimants for a reserved water right must establish their case by a preponderance of the evidence, which is the appropriate standard of proof in this matter.

9. "Arable lands" are those lands which are capable of sustained irrigation or which can sustain long-term irrigation.

10. The United States relied upon facts and data from the Bureau of Indian Affairs, the Bureau of Reclamation

(also known as the Water and Power Resources Service), and the Soil Conservation Service, as well as new data compiled by its experts, in presenting its arability determination.

11. The United States' experts developed six study areas for its land classification consisting of approximately 490,000 acres.

12. The preliminary land classification study analyzed the land capability criteria of depth to barrier, water holding capacity, permeability, slope and texture to establish the study areas. This was done in a persuasive and credible fashion.

13. The United States classified the lands in the six study areas into six classes, segregating lands with similar characteristics into the same class with a reasonable degree of consistency and objectivity.

14. Factors considered by the United States in its land classification include soil texture, depth, moisture retention, alkalinity, salinity, surface gravel and cobble, slope, irrigation pattern and field size, level of the surface, surface cover, drainage, hydraulic conductivity and soil depth to barrier.

15. The United States' classification relied on land classifiers who had collectively more than 96 years of experience in the field and who augured and logged 197 borings between 5 and 10 feet, 357 borings of 5 feet or less, dug 9 backhoe pits, drilled and logged 117 deep holes, analyzed samples from 165 holes for soil chemistry, and ran 11 infiltration and 22 hydraulic conductivity tests.

16. Experts for the State of Wyoming reviewed the HKM data, but spent limited time in the field on the Reservation. The thrust of their testimony was to question the amount of arable land HKM identified. Mr. Fowkes' testimony was general in nature, and he pre-

sented no acreage totals he felt should be deleted from those identified as arable by HKM.

17. Some degree of error inevitably exists whenever a group of land classifiers are required to coordinate and analyze such a complex area as the Wind River Indian Reservation, relying on a field of expertise which, by its nature, lacks the certainty of mathematical perfection or of objectivity.

18. Ten to fifteen percent is an appropriate reduction of the classified lands of the United States to account for the error and inaccuracy described above.

19. The United States met its burden of proof in establishing the land base for the determination of arability.

20. It is not a prerequisite in establishing a land classification that each and every tract, plot and parcel of land have a complete record of borings, diggings and testings.

21. A classification for arable land does not require consideration of economics to meet the test of practicably irrigable acreage so long as economics is considered elsewhere in the PIA determination.

22. The following acreage totals satisfy arable land base determinations for future projects:

Area	Acres
North Crowheart	43,089
South Crowheart	7,187
Big Horn Flats	17,681
Riverton East	4,223
Owl Creek	223
Arapahoe	3,614
TOTAL	76,017

23. The Owl Creek Unit is a small project and was discussed by Dr. Mesghinna in conjunction with his testi-

mony regarding Type VIII land. Findings regarding Owl Creek are therefore included among the findings regarding Type VIII lands under "Historics".

24. Dr. Mesghinna of Stetson Engineers testified for the United States on engineering feasibility. The Tribes offered additional evidence from Keller Engineers and the State of Wyoming relied on the testimony from Banner and Associates.

25. The testimony of Dr. Mesghinna on the factors relating to engineering feasibility was a thorough, professional presentation and analysis of the subject. He is a supervising engineer for Stetson Engineers, specializing in irrigation systems design, drainage and hydrology. He is a well qualified expert in irrigation systems design and engineering, irrigation construction costs, drainage and water requirements.

26. The Federal parties' testimony on elevation distinctions, cropping patterns, water availability, soil characteristics, market factors and other product transportation, is reasonable and persuasive.

27. The calculations by Dr. Mesghinna of the net irrigation requirement, costs and designs for the on-farm system, the pipe network, pumps and pumping plants, canals and related structures, drainage, and operation and maintenance are reasonable and supported by a preponderance of the evidence.

28. The Tribes assert through Keller Engineers that the designs and costs of Dr. Mesghinna were more expensive than necessary to accomplish the desired irrigation projects. They maintain investment and operating costs could be significantly reduced with alternative design features, lower operating pressures, and life cycle optimizing techniques, and contend that the natural drainage capacity of the lands was underestimated and that the drainage system design proposed by Dr. Mesghinna

was more intensive than necessary. I find this not persuasive.

29. The major point of disagreement from the experts for the State of Wyoming was with Dr. Mesghinna's engineering and contingencies costs, with Mr. Sostrom for the State using 35% as his cost, while Dr. Mesghinna used 25%. Mr. Sostrom also added 8% for mobilization.

30. The thorough approach of Dr. Mesghinna exhibited an independence detached from preconceived estimates of what should be the result and is supported by a preponderance of the evidence as the most reasonable conclusions on engineering feasibility.

31. Dr. Mesghinna's acreage totals must be reduced to reflect the reduction made in the arable land base determination of HKM but to account for the 5% reduction already made by him in his analysis.

32. The following acreage totals satisfy the engineering feasibility determination for the future projects:

Area	Acres
North Crowheart	34,993
South Crowheart	4,238
Arapahoe	3,437
Riverton East	3,442
Big Horn Flats	2,410
TOTAL	48,520

33. In his determination of diversion requirements, Dr. Mesghinna considered average wind velocity, water holding capacity, cropping patterns, root depths, type of delivery and conveyance systems planned, source of water, conveyance distance, amount and velocity of water in the canals, efficiencies and management techniques.

34. The United States claimed a total diversion requirement of 209,372 acre-feet while the State of Wyoming claimed it should not exceed 180,424.3 acre-feet.

35. The United States claim for unit diversion and total diversion is reasonable and supported by convincing and the better evidence, particularly since Dr. Mesghinna's average water duty is more restrictive than the present historic use in Water Division 3.

36. Numerous witnesses testifying in Worland presented evidence of greater use than that claimed by the United States and their testimony indirectly supports the above Findings and Conclusion in that regard.

37. The total diversion requirement must still be reduced by the 10% factor for error and inaccuracy from the arable land base. Thus, the total diversion for each of the future projects is as follows:

Project	Total Diversion (acre-feet/year)
North Crowheart	133,324
South Crowheart	18,181
Arapahoe	15,088
Riverton East	15,837
Big Horn Flats	6,507
TOTAL	188,937

38. The United States, through the testimony of Mr. Dornbusch, presented an economic feasibility analysis for the "at a reasonable cost" aspect of the practicably irrigable acreage test. Mr. Dornbusch is both a graduate engineer and an economist. He is experienced in feasibility studies for irrigated agriculture and other agricultural industries. He has performed large scaled agricultural feasibility studies both in this country and broad.

39. The State of Wyoming followed the benefit-cost ratio approach, but maintained that none of the future projects would be economically feasible.

40. Dr. James Jacobs, for the State of Wyoming, performed an economic analysis of the projects. Dr. Jacobs

is a professor of agricultural economics at the University of Wyoming. His experience has primarily been with the economic effect of varying agricultural practices. He has had experience with crop budgets.

41. The cropping patterns developed by Mr. Dornbusch from a variety of sources were reasonable and supported by a preponderance of the evidence. His crop yields were supported by a variety of sources in the evidence and were reasonable, as were his crop prices.

42. The determination by the experts for the State of Wyoming of production costs based on a 320 acre farming unit is unrealistic in light of the proposed future projects and unreasonably inflates the production cost estimate.

43. Mr. Dornbusch's approach to estimating prices, useful life and hours of use for the farm machinery was reasonable, supported by the preponderance of the evidence, and was more realistic than the alternative evidence.

44. Mr. Dornbusch analyzed the employment outlook for Indians on the Wind River Indian Reservation and concluded some opportunity costs for labor and management could be reduced or eliminated given the historically high rate of unemployment on the Reservation.

45. A high percentage of unemployment exists on the Wind River Indian Reservation and the preponderance of the evidence clearly supports the position of the United States on farm labor costs as well as management costs.

46. The incremental, or ten year phase-in of management personnel from the Indian labor force by Mr. Dornbusch is reasonable and supported by a preponderance of the evidence, and ignoring such a training program can only unreasonably inflate the management cost estimates.

47. The normalization factor used by Mr. Dornbusch for prices and costs is supported by a preponderance of the evidence and is representative of current practices.

48. The United States, the State of Wyoming, and the Tribes all presented experts and testimony on the appropriate discount rate to use in the economic feasibility analysis.

49. In determining the appropriate discount rate, the relevant considerations are the oppportunity cost of capital displaced from investment and consumption in the long term and social time preference.

50. Mr. Dornbusch for the United States selected a range of two to four percent as the correct discount rate. He used four percent as a conservatice figure in his analysis.

51. Dr. Stephen Goldfeld, on rebuttal as a witness for the United States, testified that an appropriate range would be from one to four percent, with two and one-half as a single rate to use. Dr. Goldfeld is the head of the Department of Economics at Princeton University and has served on the staff and as an appointed member of the President's Council of Economic Advisors. Real rates of interest and costs of capital are at the center of his area of specialization.

52. Dr. David Brookshire for the State of Wyoming testified that a range of four to eleven percent should be used and that no single rate should be selected.

53. Dr. Ronald Cummings for the Tribes questioned whether discounting was necessarily proper in evaluating the future needs of the Wind River Indian Reservation, but concluded that he would select a range of two to four percent as appropriate.

54. The preponderance of the evidence clearly supports as reasonable the discount rate used by the United States in its economic analysis.

55. Mr. Dornbusch concluded, after applying a four percent discount rate in his feasibility study, that the five projects designed by Dr. Mesghinna were economi-

cally feasible. He provided the following benefit-cost figures:

Project	B-C Ratio
North Crowheart	1.17
South Crowheart	1.29
Big Horn Flats	1.07
Riverton East	1.25
Arapahoe	1.53

56. Dr. Goldfeld's analysis of the Fraumeni-Jorgenson article, "Rates of Return by Industrial Section in the United States, 1948-76," and his position on opportunity cost of capital was more persuasive than that of Dr. Brookshire and is supported by the more persuasive evidence as the better reasoning.

57. A conclusion of an economic or sensitivity analysis on the Wind River Indian Reservation that none of the proposed project lands are economically feasible is refuted by the evidence of the case and is so contrary to the conditions of the Reservation that it lacks any probative value.

58. Mr. Willard Wilson, Chairman of the Board of a bank in Thermopolis, testified that an appropriate net, inflation-proof profit margin would be one-half to three percent in banking, which is financial analysis evidence that supports in part the above findings.

59. The claimants for a reserved water right have established their asserted case by a "preponderance of the evidence", which is the standard of proof clearly appropriate in this matter.

60. Future lands found to be practicably irrigable and therefore deserving of an award of a reserved water right as listed are as follows:

Project	Acreage	Unit Diversion (acre-feet/acre)	Total Diversion (acre-feet/acre)
North Crowheart	34,993	3.81	133,324
South Crowheart	4,238	4.29	18,181
Arapahoe	3,437	4.39	15,088
Riverton East	3,442	4.60	15,837
Big Horn Flats	2,410	2.70	6,507
TOTAL	48,520		188,937

E. ADDITIONAL TRIBES' FUTURES

1. The Tribes presented the testimony of Lyman Willardson, Ronald Bliesner and Jack Keller in support of their additional claim for practicably irrigable acreage on Stagner Ridge and additional land in Big Horn Flats.

2. The Tribal testimony generally concluded that the Stetson conceptual irrigation plan was more elaborate than necessary and therefore too costly.

3. The analysis performed by Dr. Willardson was cursory and a very small amount of time was actually spent in field investigation.

4. Experts for the United States, namely Stetson Engineers and Dornbusch and Company, also evaluated the additional future acreage and excluded it from their final totals.

5. The Tribes advanced a claim that the additional future lands would be economically feasible by reducing the planned drainage of Dr. Mesghinna and passing that cost saving to the additional acreage.

6. The drainage plan proposed by Stetson is reasonable and any reduction in it jeopardizes the chance for proper drainage of the proposed projects.

7. The additional claims for future acreage on Stagner Ridge and Big Horn Flats Extension must be denied because they fail to meet the test of practicably irrigable acreage and do not meet the burden of proof generally from the evidence introduced.

F. GROUNDWATER

1. An evaluation of the resources was made for the United States by Oliver Page, an expert in hydrogeology and groundwater uses. Similarly, Robert Brogden, a groundwater geologist, testified for the State.

2. To determine presence and extent of groundwater, Mr. Page identified the geology and conducted pump tests to measure well pumping rates and groundwater levels.

3. The testimony of Mr. Page and the evidence presented warrants the conclusion that there is abundant groundwater supply in virgin condition on the Wind River Indian Reservation.

4. The principal source of water saturating the alluvium is surface water from streams flowing over the alluvium deposits, and this geologic fact requires certain limitations upon the use of the groundwater.

5. I find that Mr. Page's estimated well yields were professional and consistent with the practice of others in his profession, and that his reliance upon U.S.G.S. data for certain well fields was reasonable and consistent.

6. The Indians have the right to the use of the groundwater in the various aquifers beneath the land which is theirs, in trust or in fee.

7. The mineral resources and corresponding water supply requirements detailed in footnote 1 on page 220 of this Report are found to be reasonable, but the sources will not apply to additional volumes of water needed to meet the future needs.

8. The deeper acquifers are to be the source for future industrial expansion so that the recharging of aquifers and present and future surface flows will not be endangered.

9. The *Cappaert* doctrine is applicable only if the purpose for which the Wind River Indian Reservation was created is threatened with defeat through the use of groundwater by non-Indians around and within the Reservation. That is not the situation in this case.

10. There is nothing in *Cappaert* law, or in the *Winters* concept, or in the evidence of this long proceeding, which warrants a right to the Tribes to impinge upon the groundwater users of adjoining areas, or those of fee owned inholdings within the boundaries of the Reservation.

11. A mineral reservation results from the explicit language of a statute; an implied reservation of water does not. Consequently, a reserve mineral clause in withdrawals is a matter of public record, and is consistent with patents which were issued to the settlers on the ceded lands.

12. The reserved right does not assure the Tribes the use of replenishable groundwater.

13. The water in the aquifers which occur in the formations is a constantly changing amorphous body and is transient in its nature, unlike land.

14. There is sufficient groundwater on the Reservation for present uses, and future increases in water uses for municipal, domestic and commercial purposes may be met without the use of surface water.

15. The proposed mineral and resource developments include the enhanced recovery work at two oil fields, natural gas processing where existing needs are currently being met, a coal mine, an electric generating station, a phosphate rock mine, one anhydrous ammonia plant, a phosphate rock beneficiation and acid production plant, and a wall board manufacturing operation plant. These proposed uses should rely on the Madison and other "deeper" sources, rather than on the Wind River aquifer and other terrace and shallow aquifers.

16. A preponderance of the evidence supports the conclusion that unregulated development of shallow groundwater would so lower aquifers of the alluvium, such as the Wind River formation, and other shallow structures adjacent to the Wind River, that irreparable harm will result to all users relying upon the Wind River for existence.

17. Mr. Merchant, for the United States, testified to estimations of Indian population growth and the present and projected need for water for municipal, domestic and commercial purposes. I find his study is reasonable and supported by a preponderance of the evidence.

18. In order to protect the Wind River aquifer and other groundwater formations from irreparable damage, the exporting of groundwater outside the stipulated boundaries of the Reservation is denied.

19. The above denial of the right to export groundwater does not constitute an undue burden on interstate commerce, inasmuch as no similar denial is made herein regarding surface waters awarded to the Tribes. In this regard, the *Sporhase* precedent is undisturbed.

G. FISHERIES, WILDLIFE AND AESTHETICS

1. Wildlife and Aesthetics

1. Hunting is mentioned in the Ft. Bridger Treaty of 1968, and is one of the purposes for which the Reservation was created.

2. The United States advanced that the entire flow of fifty-one (51) streams was necessary for aesthetic and wildlife purposes. Most of these streams occur in two areas designated as the Aesthetic Belts.

3. Evidence of intent to pursue industrial or mineral development within the Aesthetic Belt areas is uncontroverted, as is the fact that a stream that carriers a flow

of sixty percent (60%) of maximum historic flow will serve the same purposes for aesthetic and wildlife habitat as will one at one hundred percent (100%) of maximum historic flow.

4. The 60% factor will thus be used on all claims for instream flows in the two Aesthetic Belts of the Wind River Indian Reservation.

2. Fisheries

1. An implied reserved right for fisheries has been recognized by courts in at least three cases: *Menominee Tribe v. United States*, 383 F.2d 998 (1967), *Coleville Confederated Tribes v. Walton*, 460 F.Supp. 1320 (1978), and *United States v. Anderson*, No. 3643 (E.D. Wash.), July 23, 1979.

2. The testimony of Robert N. Harris, Sr., Chairman of the Shoshone Business Council, underscores the history and present importance of fishing to the Shoshones. Fishing on the Reservation, once done for subsistence, has in later years become a profit making proposition for the Tribes.

3. The impact of non-Indian fishing on the Reservation is greater on the main stem of the Wind River than on various Popo Agie or Little Wind streams or tributaries.

4. An award of fifty percent (50%) fisheries instream flow is adequate on the various forks and main stream of the Little Wind since they virtually headwater in Aesthetic Belt number 2, which has a 60% flow protection.

5. The testimony of witness Vogel supports the claim of the United States for an instream flow for fisheries, however, the incremental methodology used by him is still not so solid as to support an award of flows in the amounts he recommends.

6. Fifty percent (50%) of mean monthly flows in Stream Reaches 1 through 9 and Stream Reaches 15 and 16 is a reasonable and adequate award. However, this award shall not apply to Stream Reach 6 if said flow will impair contractual obligations with the Bureau of Reclamation regarding releases at Boysen Dam for downstream water and irrigation requirements.

7. An award for Stream Reaches 10, 11 and 12 of sixty percent (60%) of mean monthly flows is reasonable and adequate.

8. An award of forty percent (40%) of the claimed flows is made on Stream Reaches 13 and 14, and is reasonable and adequate.

3. Exclusive Storage Claim

1. The United States and Tribes assert that if full instream flows herein, plus historic and future irrigation requirements, cannot be satisfied, they be granted the right to construct exclusive storage facilities so that all their competing claims alone can be fulfilled.

2. To allow upstream storage and impoundment for exclusive Indian needs, without regard or consideration for the thousands of other citizens of Water Division 3 who also can benefit from managed storage, and who also have a right to the use of water, would be a disordered and unconscionable act.

3. The claim of the Tribes to construct exclusive storage facilities to satisfy competing claims is denied.

H. ESTOPPEL

1. Many state water rights may well be diminished to some degree in value by an award herein. Their owners feel strongly that the Federal government should be estopped from asserting a reserved right, particularly for futures projects on the Reservation, or in the alterna-

tive should compensate them for damages. Many, particularly families of those induced to pioneer the land, feel that at least the rights for future projects should be held in abeyance until upstream storage is in place to assure no adverse affects on state water rights.

2. Wyoming and private parties urge that simple notions of fair dealing estop the United States from asserting reserved water rights inconsistent with water rights acquired under Wyoming law.

3. Though damage may result in some degree to holders of state water rights, the application of estoppel as requested would merely be the imposition of a second wrong to atone for the first. Application of the doctrine is not warranted.

4. In this case, Wyoming brought the suit, and in effect the prayer of her Complaint is to have the Federal claims quantified. Neither equitable apportionment nor estoppel are remedies open to Wyoming.

I. EFFECT ON STATE WATER RIGHTS

1. Many settlers who applied for and received early permits labored for years to perfect their ditch work and diversions into adjudicated certificates to assure a source of water.

2. Congress intended and impliedly approved the "first in time, first in right" system adopted in the Territory of Wyoming, ratified by statehood, and long the policy of Wyoming. Today owners of water rights in Division 3 may suffer damages from an inability to put their rights to full use following the emplacement of an 1868 priority date for Indians in the upper reaches of the Wind River.

3. The Homestead Act of 1862, expanded in 1916 to include grazing lands, set out conditions for settlement of unappropriated public lands in the Rocky Mountain West. As a result of this legislation, between 1890 and 1920

over 132,898 acres in Water Division 3 were settled by non-Indians.

4. By the Desert Lands Act of 1873, Congress recognized that water was necessary for the successful settlement of arid western lands, thus assenting to the doctrine of prior appropriation. As a result of this Act, between 1916 and 1925 approximately 23,590 acres in Water Division 3 were settled by non-Indians.

5. Congress, in the Carey Act of 1894, again recognized the prior appropriation doctrine, the importance of water, and the necessity of irrigation for the successful development of arid lands. That Act outlined a disposal policy which resulted in the additional settlement by non-Indians of approximately 75,111 acres in Water Division 3.

6. The Reclamation Act of 1902 further recognized the necessity of water for settlement in the West. It stated that any project authorized under the Act was to proceed in recognition of state water rights laws. In Water Division 3, over 23,000 acres were deeded to non-Indians under this Act.

7. Approximately 255,000 acres in Water Division 3 were settled by non-Indians as a result of the Homestead Act of 1862, expanded in 1916, the Desert Lands Act of 1873, the Carey Act of 1894, and the Reclamation Act of 1902.

8. Under the doctrine of prior appropriation, imposition of an 1868 priority date for reserved water may have an adverse effect upon valid permits and certificates. To what degree each is harmed depends first upon its location, next its priority, and then quantity and scope of the newly recognized rights.

9. Some 9,000 defendants are on record as holders of approximately 25,000 adjudicated certificates, as evidenced in Master's Exhibit No. 1.

10. The State employed Mr. Gordon W. Fassett, an associate of Leonard Rice Consulting Engineers, and a registered engineer in at least three western states. Though Mr. Fassett and his assistants were professional and expert in their work, his model of water rights and effects thereon is not a basis for any finding of fact or conclusion of law. The assumptions that all Federal and Indian claims would be awarded and simultaneously exercised put a strong measure of qualification on the results.

11. Mr. Fassett arrived at a figure of about 800,000 acre-feet as the annual diversion requirement for Indian claims. Such a figure is much higher than if every optimized Indian and Federal claim were to be granted.

12. The Fassett model served its purpose, to buttress the proposition that state water rights would be adversely affected by the imposition of an 1868 reserved water right date on all Indian claims.

IN THE DISTRICT OF THE
FIFTH JUDICIAL DISTRICT
STATE OF WYOMING

Civil No. 4993

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHT TO USE WATER IN THE BIG HORN RIVER SYSTEM AND ALL OTHER SOURCES, STATE OF WYOMING

RECOMMENDED FINAL DECREE OF WATER RIGHTS FOR THE WIND RIVER INDIAN RESERVATION

ARTICLE I

Definitions

For the purpose of this decree:

A. "Diversion Requirement" means the amount of water necessary to be diverted from naturally occurring streams to supply beneficial uses.

B. "Indian water rights" means water rights reserved by the Treaty of Fort Bridger of July 3, 1868 with a priority date thereof, and held in trust by the United States for the benefit of the Shoshone and Arapahoe Indian Tribes of the Wind River Indian Reservation and other Indians on the Reservation holding land in fee, as described, quantified, or limited and set forth in the Articles of this decree.

C. "Livestock water requirements" means the diversion requirement necessary to satisfy the needs of livestock on the Wind River Indian Reservation.

D. "Municipal water requirements" means the diversion requirement, in addition to groundwater sources, to satisfy the personal water needs for the Indian population of Fort Washakie, Riverton, Ethete, Boulder Flat, Arapahoe, Pavillion, and remaining rural areas of the Wind River Indian Reservation for domestic, commercial and light industrial use.

E. "Stream Reach" means that section of a river or stream designated in United States Exhibit WRIRC-281, which is hereby incorporated by reference and made a part of this decree, and described herein, which depicts the section of river or stream through which fishery flows are required.

F. The boundaries of the Wind River Indian Reservation have been stipulated to by the parties. That stipulation is attached hereto as Appendix 1.

ARTICLE II

IT IS ORDERED, ADJUDICATED AND DECREED that the United States has reserved, in trust for the benefit of the Shoshone and Arapahoe Tribes of the Wind River Indian Reservation, the right to divert water or have water diverted in amounts set forth herein and from streams set forth herein, and further that said right has a priority date of July 3, 1868. The State Engineer shall have the right to monitor all said diversions.

The United States and the Shoshone and Arapahoe Tribes shall have the right to prevent the diversion of water from said streams if said diversion would interfere or prevent the United States or the aforesaid Tribes from utilizing the water rights herein established, granted and recognized.

SECTION 1

Agricultural Water Decreed

DESCRIPTION/SOURCE	AWARDED MEASURE IN ACRES	AWARDED ANNUAL DIVERSION IN ACRE-FEET
PROJECT LANDS—HISTORIC (does not include Indian fee owed land)		
WIND RIVER FEDERAL IRRIGATION PROJECT		
Little Wind Unit:		
Ray Canal	8,728	40,573
Coolidge Canal	6,425	27,880
Sub Agency Canal	2,958	13,730
Subtotal	18,111	82,183
Upper Wind Unit:		
(unspecified)	492	2,056
Wind River "A" Canal	944	9,959
Dinwoody Canal	4,716	49,754
Subtotal	6,152	61,769
Johnstown Unit:	667	3,837
Lefthand Unit:	1,205	7,267
MIDVALE IRRIGATION DISTRICT	561	2,738
RIVERTON-LECLAIR IRRIGATION DISTRICT:	1,066	5,117
PROJECT LANDS SUBTOTAL	27,762	162,911
NON-PROJECT LANDS—HISTORIC (including all Indian owned fee lands awarded)		
WIND RIVER BASIN		
East Fork Wind River	32	141
Dinwoody Creek	134	649
Sand Draw	—0—	—0—
Dry Creek	1,273	5,584
Bull Lake Creek	63	296
Meadow Creek	680	3,125
Dry Pasup Creek	1,550	7,179
Crow Creek	2,[illegible]	11,646

DESCRIPTION/SOURCE	AWARDED MEASURE IN ACRES	AWARDED ANNUAL DIVERSION IN ACRE-FEET
Willow Creek	194	876
Main Stem Wind River	4,442	20,842
Subtotal	10,873	50,338
LITTLE WIND RIVER BASIN		
North Fork Little Wind River	1,712	7,961
South Fork Little Wind River	1,113	5,085
Main Stem Little Wind River	1,620	8,177
Mill Creek	28	136
Sage Creek	1,797	8,686
Crooked Creek	69	317
Trout Creek	228	1,088
Spring Creek	178	773
Bighorn Draw	139	600
Subtotal	6,884	32,823
BIGHORN RIVER BASIN		
Main Stem Bighorn River	54	280
Cottonwood Creek	689	3,548
Fivemile Creek	423	2,055
Muddy Creek	3,293	15,819
Dry Muddy Creek	—0—	—0—
Maverick Springs Draw	—0—	—0—
Roundup or Warm Springs	35	153
Subtotal	4,494	21,855
POPO AGIE RIVER BASIN		
North Fork Popo Agie River	472	2,231
Main Stem Popo Agie River	71	347
Subtotal	543	2,578
OWL CREEK BASIN		
South Fork Owl Creek	998	4,455
Main Stem Owl Creek	2,069	9,775
Mud Creek	766	3,620
Red Creek	—0—	—0—
Subtotal	3,833	17,850
NON-PROJECT LANDS SUBTOTAL	26,627	125,444

PROJECT LANDS SUBTOTAL	27,762	162,911
*TOTAL HISTORIC PROJECT AND NON-PROJECT LANDS	54,389	288,355

*Including Indian owned fee lands, totaling 6,155 acres and an awarded diversion of 28,095 acre-feet per year.

FUTURE PPROJECTS	AWARDED MEASURE IN ACRES	AWARDED ANNUAL DIVERSION IN ACRE-FEET
North Crowheart	34,993	133,324
South Crowheart	4,238	18,181
Arapahoe	3,437	15,088
Riverton East	3,442	15,837
Big Horn Flats	2,410	6,507
TOTAL FUTURE PROJECTS	48,520	188,937

SECTION 2

Livestock Water

The United States and the Tribes are hereby awarded the use of groundwater which is fed by the Wind River, the Little Wind River, the Popo Agie River, into the Wind River aquifer and other shallow terraces and river level formations for livestock water requirements. Provided, however, that locations and flows of said wells be maintained in accurate records and said records be available to the State Engineer in order that monitoring may take place of the said livestock water requirements.

In addition hereto, the Tribes may divert up to 750 acre-feet annually from both the Wind River and Bighorn River or their tributaries, and from the Little Wind River or its tributaries; 60 acre-feet annually from the Popo Agie River or its tributaries; and 800 acre-feet annually from Owl and Red Canyon Creeks or their tributaries, for livestock water requirements. These surface diversions may be increased, but in no event shall they exceed twenty percent (20%) additional thereto prior to the year 2020.

SECTION 3

Municipal Water

The United States and the Tribes are awarded the following amounts for municipal, domestic and light commercial purposes:

AREA	SOURCE	ACRE-FEET PER YEAR 1980	2000	2020
Riverton	Big Wind River	18	32.4	46.8
	Groundwater	18	32.4	46.8
Fort Washakie	Little Wind River	455	799.2	1,166.4
Ethete	Little Wind River	257	450.0	658.8
Boulder Flat	Popo Agie River	26	44.4	67.2
Arapahoe	Groundwater	155	273.6	397.2
Pavillon	Groundwater	2	3.6	4.8
Other Rural	Groundwater	110	193	283.2
	TOTAL	1,041	1,828.8	2,671.2

SECTION 4

Industrial and Mineral Development

MINERAL/ACTIVITY	MAXIMUM ANNUAL WATER USE in Acre-Feet
Oil Enhanced Recovery	6,580
Gas Refining	6
Sulfuric Acid Production	95
Anhydrous Ammonia Production	4,250
Coal Surface and Underground Mining	25
In Situ (Gasification and Syngas Production	2,800
Electricity Generating Station	2,490
Uranium Underground Mining	15
Yellowcake Processing	475
Phosphate Underground Mining	5
Beneficiation and Calcining Plant	425
Phosphoric Acid Production	400
Gypsum Surface Mining	10
Wallboard Production	300
TOTAL	17,876

Of the above, 9,370 acre-feet can be served from either surface or groundwater; provided, however, that all of the aforesaid future industrial groundwater award shall be from the deep aquifers. All shallow aquifers shall not be used as a water source for present or future industrial development. The lower or deeper water bearing formations, i.e. the Madison, the Big Horn, the Dolomite and the Frontier, are to be the sources for water for future industrial activities.

The exporting of groundwater outside the stipulated boundaries of the Wind River Indian Reservation for whatever purpose is hereby denied.

ARTICLE III

Fisheries, Wildlife and Aesthetics

IT IS FURTHER ORDERED, ADJUDICATED AND DECREED that the United States has reserved by virtue of the Treaty of July 3, 1868, and for the benefit of the Shoshone and Arapahoe Tribes, the right to prevent any person from diverting or attempting to divert from the minimum in stream flows of any of the waters in the following streams as set out in Section 1 and Section 2 of this Article. Provided further that said rights to prevent diversions or attempts to divert may be exercised by the United States or by the Shoshone or Arapahoe Tribes.

SECTION 1

Aesthetics and Wildlife Flows

There is hereby awarded a minimum stream flow of sixty percent (60%) of maximum historical flows on all streams and creeks within the boundaries of the two Aesthetic Belts on the Wind River Indian Reservation. Said Belts are depicted on United States Exhibit WRIR-7, which is hereby incorporated by reference and made a

part of this decree. This requirement is non-consumptive in nature.

The right to the maintenance of sixty percent (60%) of maximum historic levels for the level of all natural lakes in the aforesaid two Aesthetic Belts is also awarded herein.

SECTION 2

Fishery Flows

There is hereby awarded the following mean monthly flows through the designated Stream Reaches of the Wind River Indian Reservation as defined in Exhibit WRIRC-281. Provided, however, that the awards on Stream Reach 6 shall be subject to prior contracts of the Bureau of Reclamation regarding releases from Boysen Dam to satisfy downstream irrigation and other water requirements.

FISHERY FLOWS

Mean Monthly Flows (CFS)

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Stream Reach 1—Wind River (above Dinwoody Creek)	87	86	88	129	160	160	160	160	160	160	123	100
Stream Reach 2—Wind River (between Dinwoody and Bull Lake Creeks)	102	100	104	142	250	250	250	250	250	222	151	120
Stream Reach 3—Wind River (between Bull Lake Creek and Diversion Dam)	127	125	129	186	250	250	250	250	250	250	183	146
Stream Reach 4—Wind River (between Diversion Dam and Little Wind River confluence)	128	125	130	163	163	163	163	163	163	163	163	147
Stream Reach 5—Wind River (below Little Wind River to boundary of Boysen Reservoir Withdrawal Area)	197	192	198	250	250	250	250	250	250	250	250	220
Stream Reach 6—Wind River (Wind River Canyon)	200	195	222	250	250	250	250	250	250	250	250	222
Stream Reach 7—East Fork Wind River (below Wiggins Fork)	23	22	23	48	104	104	104	104	62	41	28	25
Stream Reach 8—Bull Lake Creek (above Bull Lake)	15	16	15	24	108	108	108	108	90	42	23	17

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Stream Reach 9—Bull Lake Creek (below Bull Lake)	15	17	16	25	128	128	128	128	89	38	21	16
Stream Reach 10—North Fork Little Wind River (below North Fork Canyon)	11	11	11	16	48	48	48	48	41	21	13	11
Stream Reach 11—South Fork Little Wind River (below Washakie Reservoir)	13	15	13	19	66	66	66	55	43	24	17	13
Stream Reach 12—Little Wind River (above Popo Agie River confluence)	30	30	30	42	45	45	45	45	45	45	36	31
Stream Reach 13—North Fork Popo Agie River (below North Fork Canyon)	7	7	6	10	31	31	31	31	20	12	9	8
Stream Reach 14—Popo Agie River (below the North and Middle Forks and above Little Wind River confluence)	19	18	18	38	69	69	69	69	56	36	24	20
Stream Reach 15—Dinwoody Creek (below Dinwoody Lakes)	8	7	7	11	55	55	55	55	48	19	11	8
Stream Reach 16—Crow Creek (above Crow Creek Canyon)	2	2	2	3	6	6	6	6	4	3	2	2

ARTICLE IV

Additional Agricultural Uses for Trust Lands Outside The Stipulated Boundaries of the Wind River Indian Reservation

IT IS ORDERED, ADJUDICATED AND DECREED that the United States, as trustee for the Shoshone and Arapaho Tribes, has no reserved water right for the lands described in Section 1 and Section 2 of this Article for the reason that said lands are outside the stipulated boundaries of the Wind River Indian Reservation.

Provided, however, that the above denial in no way affects the United States' right to the use of water on the lands described in the aforesaid Sections 1 and 2 pursuant to any valid certificates or uncancelled permits issued by the State of Wyoming upon which the United States or the Tribes elect to rely.

It is further ordered that the United States or the Tribes may divert under state law the amounts authorized by state law and with the priority dates set out in the column headed "State Awarded Priority Date".

SECTION 1

ARAPAHOE RANCH
MERRILL LAND PURCHASE
LANDS NORTH OF SOUTH FORK OF OWL CREEK

WATER SOURCE: South Fork of Owl Creek

Ditch Name	Permit No.	Proof No.	Acres	State Awarded Priority Date	Average Annual Diversion (acre-feet)
Typer #4	11707	14032	64	5/16/12	350
Riggs	6621	14024	27	6/20/04	147
Typer #3	10719	n/a	9.4	none	-0-
				Total Average Annual Diversion	497

The valid state certificates and permits above have been provisionally confirmed as was done in this proceed-

ing with all other certificates and permits in Water Division 3, except those specifically recommended to the State Engineer for cancellation.

SECTION 2

PADLOCK RANCH PURCHASE
LANDS NORTH OF MAINSTEM OF OWL CREEK

WATER SOURCE: Owl Creek

Ditch Name	Permit No.	Proof No.	Acres	State Awarded Priority Date	Average Annual Diversion (acre-feet)
Sliney & Mikkleson	Terr.	3526	122.63	10/1884	662
Sliney & Mikkleson	Terr.	3526	32.0	10/1884	173
Sliney & Mikkleson	Terr.	3527	222.63	10/1884	1202
Padlock	Terr.	3534	224.35	6/1887	1212
Dewit	2306	6271	17.0	10/4/1899	92
Sliney No. 1	4038	8350	160.0	7/11/02	864
Sliney No. 1	4038	8351	160.0	7/11/02	864
Rothwell Enl. of Sliney No. 1	2125E	15024	85.0	9/17/09	459
Rothwell Enl. of Sliney No. 1	2125E	15024	233.0	9/17/09	1258
Padlock	Terr.	3533	252.0	6/1887	1361
Padlock	Terr.	3534	41.0	6/1887	221
Padlock	Terr.	3534	285.44	6/1887	1541
Padlock	none	none	24.0	none	-0-
Sliney No. 1	none	none	12.0	none	-0-
Padlock	none	none	5.9	none	-0-
Padlock	none	none	43.1	none	-0-
Sliney No. 1	none	none	44.0	none	-0-
			Total Average Annual Diversion		9,909

The valid state certificates and permits above have been provisionally confirmed as was done in this proceeding with all other certificates and permits in Water Division 3, except those specifically recommended to the State Engineer for cancellation.

ARTICLE V

All water rights listed herein may be exercised only for beneficial uses.

ARTICLE VI

All foregoing references to quantities of water necessary to supply annual diversion requirements for irrigation, and for municipal and industrial, mineral and livestock uses, shall constitute means of quantifying Indian water rights, but shall not constitute a restriction to uses indicated herein. If any Indian water rights decreed herein are used other than for purposes indicated herein, the total diversion shall not exceed the diversion requirements as set forth above; provided, however, that non-agricultural consumptive uses of waters, whether used on or off the Reservation, shall in no event be more than twenty-five percent (25%) of the annual diversion requirements awarded herein. And if said non-agricultural consumptive use is for purposes that involve the exporting of water from the Reservation, then said use is limited to ten percent (10%) of the twenty-five percent (25%) annual diversion in each decade following the date of this Report, unless upstream storage is in place to provide additional incremental storage for all water users affected. Nothing herein shall prohibit the leasing or bargaining of Tribal surface waters to upstream or downstream users, or other entities.

Provided further, that should the decision of the Tribes be to proceed with future irrigation projects in lieu of other uses, then and in that event not more than ten percent (10%) of the total acreage of the said future projects can be put into effect in any give decade unless

upstream storage facilities shall have already been constructed to provide water for the additional acreage of said future projects.

ARTICLE VII

SECTION 1

In the event that additional land within the stipulated boundaries of the Reservation, (Stipulation attached hereto as Appendix 1), not held in trust as of the date of this Report shall be acquired in trust by the United States for the benefit of the Shoshone and Arapahoe Tribes, then such acquired land shall be entitled to no reserved water right. The date for the purpose of determining priority of water rights for said lands is the date of issuance of the state awarded water permit on said reacquired land if uncancelled at the time of reacquisiiton. If cancelled, or no state rights are in effect at the time of reacquisition, there are no reserved water rights for said reacquired lands.

SECTION 2

For Indian owned fee land within the stipulated boundaries of the Reservation awarded a reserved water right herein and reacquired by the Tribes after the date of this Report, the reserved right shall continue in full force and effect.

ARTICLE IX

This is a conclusive adjudication and a final decree in its broadest and most permanent sense. The grant herein of the Tribal reserved right is based upon the amount necessary to irrigate all of the practicably irrigable acres on the Reservation. This is a definite and certain determination, designed to meet the future as well as present potential, and needs of the Tribes.

A provision herein at the foot of the decree for its amendment or further relief would be in defeat of the

very purpose of a general mainstream adjudication. Nor is it necessary to correct genuine mistake of fact or a mathematical miscalculation, or other merely clerical error, some of which may well abound in a case of this size. A court normally possesses the inherent power to correct its decrees in such matters.[1] All quantifications of the reserved right for waters necessary to fulfill the purposes of the Wind River Indian Reservation shall be the maximum and final claim for such reserved right in Water Division 3.

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[1] See *Briggs v. Pennsylvania R.R.*, 334 U.S. 304, 306 (1968); *Perkins v. Standard Oil Co.*, 487 F.2d 672, 674 (9th Cir. 1973).

The Honorable Harold Joffe, Judge
District Court of the Fifth Judicial District
Worland, Wyoming

Sir:

This Report, together with the Findings of Fact and Conclusions of Law therein contained, and the recommended decree thereto annexed are

Respectfully submitted,

Teno Roncalio
Special Master

Cheyenne, Wyoming
December 15, 1982

Teno Roncalio

This Report deals only with Indian Claims. Federal claims for usage on the other Federal entities of Water Division 3, determination of the status of uncancelled permits, and determination of the extent and priority of adjudicated rights will be addressed in a Supplementary Report.

I acknowledge with gratitude and appreciation the labors of:

Vicki Lynn Hoffsetz, whose extraordinary ability in word processing was of immense help;

Billie Ruth Edwards, whose competence in legal research was of utmost help, particularly in the compilations of Part II; and

Leo J. Salazar, my most valuable and able assistant throughout the long trial and in all phases of research and writing in the preparation of this Report.

APPENDIX I

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

STATE OF WYOMING)
) ss:
COUNTY OF WASHAKIE)

Civil No. 4993

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE BIG HORN RIVER SYSTEM AND ALL OTHER SOURCES, STATE OF WYOMING

STIPULATION CONCERNING THE BOUNDARIES OF THE WIND RIVER INDIAN RESERVATION

The United States of America, State of Wyoming and Shoshone and Arapahoe Indian Tribes move the Special Master to enter an order approving the following stipulation for the purposes of this litigation only:

For the purposes of determining the reserved or other rights to the use of water, if any, which may exist with respect to the Wind River Indian Reservation, the exterior boundaries of the Wind River Indian Reservation are as set forth in the United States Statement of Geographic Boundaries filed herein, and are agreed to include the following-described lands:

That part of the Wind River Meridian more particularly described as follows:

[Legal Descriptions Omitted in Printing]

The parties reserve their rights to challenge the validity, priority date, purposes, quantity of water, and any other characteristic of any water rights which may be claimed in the above-described area.

This stipulation shall not affect the jurisdiction of any parties over lands within the exterior boundaries of the Reservation.

AGREED this 15th day of April, 1980.

For the United States:

/s/ Regina L. Sleater
REGINA L. SLEATER
U.S. Department of Justice
Land & Natural Resources Division
Washington, D.C. 20530

/s/ T. W. Echohawk
TOM W. ECHOHAWK
U.S. Department of Justice
Land & Natural Resources Division
Washington, D.C. 20530

/s/ Charles E. Graves
CHARLES E. GRAVES
U.S. Attorney
Cheyenne, Wyoming 82001

Approved as to Legal Description:

/s/ Richard L. Oakes
Chief, Branch of Celestial Surveys
B&M, Cheyenne, Wy

For the Shoshone and Arapahoe Indian Tribes:

/s/ Harry R. Sachse
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/s/ R. Anthony Rogers
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For the State of Wyoming:

/s/ Jack D. Palma II
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/s/ James L. Merrill
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2900 Energy Center One
717 Seventeenth Street
Denver, Colorado 80202

APPENDIX 2

GLOSSARY

AUM: Animal Unit Month. The grazing requirement for one animal unit (1,000# cow) for one month.

ADJUDICATED LANDS: Land upon which exists an uncancelled state awarded permit or adjudicated water right.

ARABLE LAND: Arable lands are those lands which are capable of sustained irrigation.

BIA: Bureau of Indian Affairs.

BENEFIT/COST RATIO: An expression of probable economic feasibility of a proposal.

cfs: Cubic feet per second.

DEEP PERCOLATION: The downward movement of water through saturated soil when the force of gravity exceeds the soil water attraction.

DEPTH TO BARRIER: The depth of soil above a layer of soil or rock which has a hydraulic conductivity less than one-tenth of that of the soils lying above it.

DIVERSION REQUIREMENT: The amount of water diverted from the source in order to meet the net irrigation requirement.

DRAINAGE (INTERNAL): The removal of water from soil by natural or artificial means.

DRAINAGE DEFICIENCY: A characteristic of a soil which limits the ability to remove excess water under sustained irrigation.

EFFECTIVE ROOTING DEPTH: The depth of soil in which plant roots can effectively grow and receive essential elements necessary for growth. Water table, gravel beds, or bedrock are examples of mediums that might restrict effective rooting depth.

EVAPOTRANSPIRATION: The loss of water from the soil and plant foliage (evaporation) and by the passage of a watery vapor through the plant's membrane or pores (transpiration).

FIP: Federal Irrigation Project.

FLOOD PLAIN: The land bordering a stream, built up of sediments from overflow of the stream and subject to inundation when the stream is at flood stage.

GRAVITY IRRIGATION: A method of irrigation where water is supplied to one part of a field and is spread over the surface of the remaining portions of the field by the force of gravity.

HYDRAULIC CONDUCTIVITY: An expression of the speed with which water flows through a soil in response to a given potential gradient; permeability.

HYDROGRAPHY: The description and study of bodies of water, as in the measurement and charting of flow and investigation of the behavior of streams.

INDIAN FEE LAND: Land owned in fee by individual members of a tribe; not subject to trust control.

INFILTRATION: The downward rate of entry of water into the soil.

IRRIGABLE LANDS: Irrigable lands are those arable lands capable of sustained irrigation.

LAND CLASS: A category of lands having similar physical and economic characteristics which affect the suitability of land for sustained irrigation.

LAND CLASSIFICATION SPECIFICATIONS: A list of land deficiencies and ranges of severity of these deficiencies which are allowed in each land class.

LAND FORM: A portion of the landscape having similar distinctive land features and characteristics. It includes flood plains, terraces, benches, alluvial fans, colluvial slopes, aeolian deposits, glacial morains.

LOGGED HOLE: A comprehensive description of the layers of soil observed during completion of a soil boring.

NET IRRIGATION REQUIREMENT: The amount of water consumptively used in irrigation; the diversion requirement minus losses in conveyance, application and evapotranspiration.

NEUTRAL SOIL: A soil which is neither acid nor alkaline in reaction. Usually a soil having a pH between 6.6 and 7.3.

OPPORTUNITY COST: A value which seeks to reflect true value in terms of national perspective; the costs of a resource at its next best use.

PIA: Practicably Irrigable Acre. Those acres susceptible to sustained irrigation at reasonable costs.

PARENT MATERIAL: The unconsolidated mineral or organic matter from which the solus of a soil is developed.

PERMEABILITY: The rate with which gases or liquids penetrate or pass through a soil.

pH: The negative logarithm of the hydrogen ion activity of a soil. A relative measure of the acidity or alkalinity of a soil. A pH of 7 is considered neutral.

PRIMA FACIE: A fact presumed to be true unless disproved by some evidence to the contrary. A *prima facie* case is one which is established by sufficient evidence and can be overcome only by rebutting evidence.

RECONNAISSANCE CLASSIFICATION: This level of classification involves a general outline of land features of conspicuous importance in preliminary planning of irrigation development. It is used on large areas where only general information on the extent of arable land is required.

SCS: Soil Conservation Service.

SEMI-DETAIILED CLASSIFICATION: Reflects a degree of work effort required to obtain an accuracy level for desired results from an investigation. This level of investigation requires careful examination of land features and considerable accuracy in the separation of arable land from nonarable lands.

SODIUM ABSORPTION RATIO (SAR): Term used to express the relative activity of sodium ions versus the activity of calcium-magnesium ions in soil or water. Indicator of sodicity.

SOIL DEFICIENCY: A characteristic of a soil which limits its usefulness for sustained irrigation.

STEREOSCOPIC ANALYSIS: Interpretation of aerial photographs with the use of a stereoscope. The stereoscope produces three dimensional effects from a two dimensional representation.

STUDY AREA: That portion of the land base which, after preliminary analysis of irrigation capability, water availability and other engineering factors, displays the greatest potential for receiving irrigation water together with the capability of supporting sustained irrigation.

SUSTAINED IRRIGATION: The ability of a soil to produce a relatively high yield of crops under irrigation over a long period of time without deterioration.

TERRACE: A level, usually narrow, plain bordering a river, lake or sea. Rivers sometimes are bordered by terraces at different levels.

TOPOGRAPHY DEFICIENCY: A characteristic of topography which limits its usefulness for sustained irrigation.

USBR: United States Bureau of Reclamation.

UNADJUDICATED IN-USE LANDS: Unpermitted lands whose use is unrecorded with the State Engineer's office.

WRC: Water Resources Council. An independent agency of the Federal Government.

WATER HOLDING CAPACITY: The amount of water a soil can hold against the pull of gravity, mainly a function of soil texture.

WATER TABLE: The upper surface of groundwater, or that level below which the soil is saturated with water.

APPENDIX 3

[Index of Witnesses Omitted in Printing]

APPENDIX 4

[Index of Exhibits Omitted in Printing]

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C77-039K

STATE OF WYOMING,
Plaintiff

vs.

UNITED STATES OF AMERICA and all persons in the Big Horn River System and all other sources in Water Division Number Three, State of Wyoming,
Defendants

[Filed May 31, 1977]

ORDER GRANTING MOTION TO REMAND
AND
REMANDING TO STATE COURT

The above-entitled matter coming on regularly for hearing before the Court upon plaintiff's Motion to Remand; plaintiff appearing by and through V. Frank Mendicino, Attorney General for the State of Wyoming, Houston G. Williams, Michael D. White, Richard William and Henry W. Ipsen and the defendant United States of America appearing by and through Frederic C. Reed, William H. Burchette and Scott McIlroy and the defendants Landis Webber and the Owl Creek Ranch appearing by and through James H. Barrett, and the Court having considered the motion together with the memoranda brief

and being fully advised in the premises and having prepared and filed herein its Findings of Fact and Conclusions of Law, finding generally for the plaintiff and against the defendants, NOW, THEREFORE, IT IS

ORDERED that the plaintiff's Motion to Remand be, and the same is hereby, granted; it is

FURTHER ORDERED that this action be remanded to the District Court in and for Washakie, County, Wyoming for disposition.

Dated this 31st day of May, 1977.

Ewing T. Kerr
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C77-039K

STATE OF WYOMING,
Plaintiff

vs.

UNITED STATES OF AMERICA and all persons in the Big Horn River System and all other sources in Water Division Number Three, State of Wyoming,
Defendants

[Filed District Court of Wyoming May 31, 1977]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter coming on regularly for hearing before the Court on plaintiff's Motion to Remand this cause to state court pursuant to 28 U.S.C. § 1447. On motion by the United States of America and by this Court's order of February 23, 1977, this cause was removed to this Court from the District Court of the Fifth Judicial District of the State of Wyoming. Plaintiff now seeks an order remanding this cause to the Fifth Judicial District. After consideration of the memorandum filed by the United States in support of its Petition for Removal and the memorandum filed by the State of Wyoming in support of its Motion to Remand, and after

hearing oral argument on this matter and being otherwise fully advised in the premises, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. That the State of Wyoming commenced this action in state court under the provisions of W.S. § 1054.1 for the general adjudication of all federal, state, and private claims to water rights within the Big Horn River Basin in the State of Wyoming.

2. That the United States of America, together with numerous private parties, has been properly served with process in this action.

3. That no original suit to adjudicate water rights in the Big Horn Basin has been filed in this Court, either by the United States or any private party.

4. That out of the various parties served with process in this action only the United States has filed a motion to remove this cause to this Court. None of the private parties to this action have joined the United States in its motion for removal.

5. That petitions for a remand of this cause to state court have been filed by the State of Wyoming and by counsel for Landis Webber and the Owl Creek Ranch.

CONCLUSION OF LAW

1. This proceeding is a suit commenced under the Constitution and the Laws of the State of Wyoming for the general adjudication of rights to the use of waters of the Big Horn River system. The United States of America is a proper party to this litigation in its own proprietary capacity and as trustee for the Shoshone and Arapahoe Tribes under the sovereign immunity waiver provisions of the McCarran Amendment, 43 U.S.C. § 666.

2. This Court has concurrent jurisdiction with the Wyoming state courts to hear general water right ad-

judications under the McCarran Amendment. Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976).

3. While the McCarran Amendment has created concurrent federal and state jurisdiction over controversies involving federal rights to the use of water, it is also clear that this statute reflects a Congressional policy of utilizing comprehensive state systems for adjudication of water rights. Colorado River Water Conservation District v. United States, supra. The procedure established by the Wyoming Legislature is such a system. If the United States were able to invoke the general removal statute to remove water right adjudications properly commenced in the Wyoming courts, this Congressional policy would be seriously undermined.

4. The fundamental inconsistency between provisions of the McCarran Amendment and the removal statutes has already been recognized by several district courts which have been nearly unanimous in rejecting the federal government's right to remove McCarran Amendment suits commenced in the state courts. See: In re Bear River Drainage District, 267 F.2d 847 (10th Cir. 1959); New Mexico v. United States, Civil No. 76-024 (D.N.M., April 21, 1976); State ex rel. Reynolds v. United States, 408 F. Supp. 1029 (D.N.M. 1975); Four Counties Water Users Ass'n. v. Colorado River Water Conservation District, et al., Civil No. 8880 (D. Colo., April 12, 1965); In re Green River Drainage Area, 147 F. Supp. 127 (D. Utah 1956); In re Chiliwist Creek and Its Tributaries, Civil No. 2491 (E.D. Wash., May 29, 1964).

5. Although this case does not involve an exercise of concurrent jurisdiction, as was the case in Colorado River Water Conservation District, supra, the policy factors discussed by the Supreme Court in that case are nevertheless applicable here. The relative inconvenience of the federal forum; the desirability of avoiding piecemeal litigation; the fact that the state court first obtain juris-

diction; the absence of concurrent federal proceedings; and the extensive involvement of state or private claims in this adjudication, all support a remand of this cause to the Fifth Judicial District Court.

6. Even assuming that removal jurisdiction exists in an adjudication commenced in state court under the McCarran Amendment, this Court is under no requirement to exercise its jurisdiction. A statutory grant of jurisdiction to this Court, whether original or derivative, leaves open the question of the propriety of its exercise under particular circumstances; and the character and adequacy of concurrent state jurisdiction may require, in the proper exercise of the discretion of the federal court, that jurisdiction be relinquished in favor of the state court. In re Green River Drainage Area, supra. In the instant case the character and adequacy of the Wyoming water right adjudication system and the clear federal policy evinced by the McCarran Amendment both require that this Court defer jurisdiction to the Fifth Judicial District Court.

7. The United States has failed to satisfy the procedural requirements of the general removal statute. The general rule under 28 U.S.C. §§ 1441 and 1446 is that absent the existence of separable claims, all proper, necessary, and indispensable parties must join in the removal petition. See In re Green River Drainage Area, supra. Here, only the United States has petitioned for removal. Such a unilateral attempt to remove can be sustained only if it can be shown that separable and independent claims exist in this adjudication. This is clearly not the case here, since water right adjudications by their very nature involve a determination of interdependent and inseparable claims to relative rights in the same river system. See Colorado River Water Conservation District, supra; State ex rel. Reynolds v. United States, supra; In re Green River Drainage Area, supra. This procedural defect further warrants a remand to state court. See Santa Margarita Mutual Water Co.

v. State Water Rights Board, 165 F. Supp. 870 (S.D. Cal. 1958).

8. The existence of the Yellowstone River Compact is not a determining factor in this Court's exercise of its jurisdiction. If there is any collision between Compact provisions and the rights awarded by the state court, these issues can ultimately be reviewed by the United States Supreme Court. See United States v. District Court in and for Water Division No. 5, 401 U.S. 527.

9. The possibility has been raised that because of a potential conflict between the proprietary claims of the United States and the claims of the Shoshone and Arapahoe Tribes, the Tribes may seek to participate in this proceeding independently of their trustee. While this procedure appears to be authorized under the recent case of United States v. Aamodt, 537 F.2d 1102 (10th Cir. 1976), the mere fact that the Tribes may be represented by private counsel in this proceeding in no way affects the capacity of the state court to adjudicate their claims. The Supreme Court has already ruled that Indian water rights are subject to adjudication in state courts under the McCarran Amendment and that Indian rights and interests may satisfactorily protected under state law.

10. It has been the consistent policy of this Court to protect state court jurisdiction in those cases where there is doubt as to the propriety of removal. Anderson v. Union Pacific Coal Co., 332 F. Supp. 605 (D. Wyo. 1971); Smith v. Voss Oil Co., 166 F. Supp. 905 (D. Wyo. 1958). In the instant case the Congressional policy underlying the McCarran Amendment, the policies enunciated by the Supreme Court, and the procedural defects in the federal government's removal petition all combine to cast sufficient doubt over the propriety of removal so as to warrant a remand of this cause to the state court.

Accordingly, an order will be entered remanding the action to the state court for disposition.

Dated this 31st day of May, 1977.

APPENDIX J

WATER RESOURCES COUNCIL

44 Fed. Reg. 210 (1979)

Principles and Standards for Planning Water and Related Land Resources, Change in Discount Rate

Notice is hereby given that the interest rate to be used by Federal agencies in the formulation and evaluation of plans for water and related land resources in 7⅛ percent for the period October 1, 1979, through and including September 30, 1980.

The rate has been computed in accordance with Chapter IV, D., "The Discount Rate" in the "Standards for Planning Water and Related Land Resources" of the Water Resources Council, as amended (39 FR 29242), and is to be used by all Federal agencies in plan formulation and evaluation of water and related land resources projects for the purpose of discounting future benefits and computing costs, or otherwise converting benefits and costs to a common time basis.

The Department of the Treasury on October 18, 1979, informed the Water Resources Council pursuant to Chapter IV, D., (b) that the interest rate would be 8¼ percent based upon the formula set forth in Chapter IV, D., (a): "* * * the average yield during the preceding Fiscal Year on interest-bearing marketable securities of the United States which, at the time the computation is made, have terms of 15 years or more remaining to maturity * * *." However, Chapter IV, D, (a) further provides "* * * that in no event shall the rate be raised or lowered more than one-quarter of one percent for any year." Since the rate in Fiscal Year 1979 was 6⅞ percent (42 FR 58232), the rate for Fiscal Year 1980 is 7⅛ percent.

Dated: October 24, 1979.

Gerald D. Seinwill,

Acting Director.

APPENDIX K

WYOMING STATUTES 1977

Wyo. Stat. § 1-37-106 (1977). Adjudication of water rights.

(a) The State of Wyoming upon the relation of the attorney general may institute an action to have determined in a general adjudication the nature, extent, and relative priority of the water rights of all persons in any river system and all other sources, provided:

(i) For the purposes of this section:

(A) The term "general adjudication" shall mean the judicial determination or establishment of the extent and priority of the rights to use water of all persons on any river system and all other sources within the state of Wyoming. The court conducting such a general adjudication shall:

(I) Certify to the state board of control those legal and factual issues which the court deems appropriate for the board to determine. Upon such certification, the board shall exercise those powers and follow those procedures set forth in Rule 53 of the Wyoming Rules of Civil Procedure;

(II) Confirm those rights evidenced by previous court decrees, or by certificates of appropriation, or by certificates of construction heretofore issued by the Wyoming state board of control;

(III) Determine the status of all uncancelled permits to acquire the right to the use of the water of the state of Wyoming and adjudicate all perfected rights there-

under not theretofore adjudicated under W.S. 41-211 [§ 41-4-511];

(IV) Determine the extent and priority date of and adjudicate any interest in or right to use the water of the river system and all other sources not otherwise represented by the aforedescribed decrees, certificates, or permits;

(V) Establish, in whatever form determined to be most appropriate by the court, one or more tabulations or lists of all water rights and their relative priorities on the river system and all other sources;

(B) The word "person" shall be construed to mean an individual, a partnership, a corporation, a municipality, the State of Wyoming, the United States of America, or any other legal entity, public or private;

(ii) When the potential defendants number one thousand (1,000) or more personal service of a summons and complaint shall not be required and (A) the court shall order that the clerk obtain service on known potential defendants by mailing a court-approved notice of the action by certified mail, return receipt requested, and (B) the court shall order that the clerk obtain service on all unknown parties by publication of said notice for four (4) consecutive weeks in a newspaper published in each of the counties within which interests in and rights to the use of water may be affected by the adjudication. If there is no newspaper in one (1) or more of said counties, then publication for such counties shall be in one (1) or more newspapers published in the state, and of general circulation within said counties. If publication is in a daily newspaper, one (1) insertion a week shall be sufficient;

(iii) The complaint for such a general adjudication shall be captioned: "In re the General Adjudication of All Rights to Use Water in the _____ River System and All Other Sources, State of Wyoming";

(iv) When the water rights to be determined are located in more than one (1) county, the general adjudication may be brought in any of the counties. (Laws 1977, ch. 2, § 1).

APPENDIX L

TENTH PERMANENT RESTORATION ORDER, 39 Fed. Reg. 27561 (1974)

CHAPTER II—BUREAU OF LAND MANAGEMENT APPENDIX—PUBLIC LAND ORDERS

PUBLIC LAND ORDER

(Wyoming 36479)

WYOMING

RESTORATION OF LANDS AND/OR MINERALS TO OWNERSHIP OF SHOSHONE-ARAPAHOE TRIBES, WIND RIVER RESERVATION

By virtue of the authority contained in section 5 of the Act of July 27, 1939, 25 U.S.C. 575 (1970), and pursuant to the recommendations of the Tribal Council and the Commissioner of Indian Affairs, it is ordered as follows:

Subject to valid existing rights the following described lands and/or rights to minerals as specified herein, are hereby restored to tribal ownership for the use and benefit of the Shoshone-Arapahoe Tribes of Indians, and are added to and made part of the Wind River Reservation:

(Lengthy Legal Description Omitted in Printing)

The total area of the lands described aggregates 4,822.85 acres in Fremont and Hot Springs Counties.

/s/ John Kyl
Secretary of the Interior

APPENDIX M

WATER RESOURCE PLANNING ACT, 42 U.S.C. 1962d-17(a) (1974)

42 U.S.C. § 1962d-17. Regional or river basin plans and Federal water and related land resources projects; preparation, formulation, and evaluation

(a) Interest rate formula for discounting future benefits and cost computations; repeal of conflicting provisions and administrative actions

The interest rate formula to be used in plan formulation and evaluation for discounting future benefits and computing costs by Federal officers, employees, departments, agencies, and instrumentalities in the preparation of comprehensive regional or river basin plans and the formulation and evaluation of Federal water and related land resources projects shall be the formula set forth in the "Policies, Standards, and Procedures in the Formulation, Evaluation, and Review of Plans for Use and Development of Water and Related Land Resources" approved by the President on May 15, 1962, and published as Senate Document 97 of the Eighty-seventh Congress on May 29, 1962, as amended by the regulation issued by the Water Resources Council and published in the Federal Register on December 24, 1968 (33 F.R. 19170; 18 C.F.R. 70439), until otherwise provided by a statute enacted after March 7, 1974. Every provision of law and every administrative action in conflict with this section is hereby repealed to the extent of such conflict.

APPENDIX N

NINTH PERMANENT RESTORATION ORDER, Act of August 15, 1953, Pub. L. No. 284, 67 Stat. 592

AN ACT

To provide compensation to the Shoshone and Arapahoe Tribes of Indians for certain lands of the Riverton reclamation project within the ceded portion of the Wind River Indian Reservation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby authorized to be transferred in the Treasury of the United States from funds now or hereafter made available for carrying on the functions of the Bureau of Reclamation and to be placed to the credit of the Shoshone and Arapahoe Tribes of Indians of the Wind River Indian Reservation in Wyoming, the sum of $1,009,500, said sum shall be credited to and expended for the benefit of said tribes and their members as provided by the Act of May 19, 1947 (61 Stat. 102), as amended by the Act of August 30, 1951 (65 Stat. 208), and by the Act of July 17, 1953 (Public Law 132, Eighty-third Congress), and as may be hereinafter amended, and shall be deemed to constitute full, complete, and final compensation, except as provided in section 5 of this Act, for terminating and extinguishing all of the right, title, estate, and interest, including minerals, gas and oil, of said Indian tribes and their members of, in and to the lands, interests in lands, and any and all past and future damages arising out of the cession to the United States, pursuant to the Act of March 3, 1905 (33 Stat. 1016) of that part of the former Wind River Indian Reservation lying within the following described boundaries:

(Lengthy Legal Description Omitted in Printing)

Provided, That any member, or the heirs or assignees of any member, of either of said tribes, who on the 24th day of July 1952, had an existing and valid assignment on any part of the above-described land, shall have the right, at his or her option, within one year after the date of enactment of this Act, to enter into a contract with the United States, by and through the Bureau of Reclamation, for the purchase, at a price and on terms satisfactory to the Secretary of the Interior, of all or any contiguous part of such assignment, and upon final payment of the purchase price therefor, a fee patent accordingly shall be issued to such assignee, subject to reservations of all oil, gas, and minerals to the United States, and subject to section 5 of this Act, and if any part of the land so selected shall contain land irrigable under the Riverton reclamation project, then said patented land shall be subject to all irrigation charges, taxes, and liens imposed by Federal or State law, to the same extent and in like manner as other lands of the Riverton reclamation project: *Provided further*, That all existing contracts relating to irrigation charges, with respect to such irrigable land, shall remain in full force and effect: *And provided further*, That nothing in this Act shall be construed to affect the rights and interests in and to any land embraced within the tract described herein that has been allotted to an individual member of either of the said tribes which, on the date of enactment of this Act, is held by the United States in trust for such member or his or her heirs.

SEC. 2. Subject only to the existing rights and interests which are not extinguished and terminated by this Act, all unentered and vacant lands within the area described in section 1 hereof, are hereby restored to the public domain for administration, use, occupancy, and disposal under the reclamation and public land laws of the United States: *Provided*, That the sale or other disposition of such lands shall be at rates and upon terms

and conditions approved by the Secretary of the Interior: *Provided further*, That the average price of all such lands disposed of by sale shall be not less than $6.25 per acre.

SEC. 3. The sum transferred to the credit of the Shoshone and Arapahoe Tribes of Indians as aforesaid and the expenses of carrying out the provisions of this Act shall be nonreimbursable and nonreturnable under the reclamation laws of the United States. The net proceeds derived from the disposal of said lands shall be covered into the general fund of the Treasury or into the reclamation fund as the Secretary of the Interior shall find appropriate in the light of the source from which the funds transferred or expended in carrying out this Act are derived.

SEC. 4. Subject to any outstanding rights and interests, all of the ceded lands of the Wind River Reservation withdrawn pursuant to the Act of June 17, 1902, for the development of the Riverton reclamation project, Wyoming, not included within the boundaries of the tract described in section 1 of this Act, are hereby restored to the ownership of said tribes to the same extent as the ownership provided by the Act of July 27, 1939 (53 Stat. 1128), with respect to vacant lands ceded to the United States under the provisions of the Act of March 3, 1905 (33 Stat. 1016), but not subsequently withdrawn for reclamation purposes: *Provided*, That the compensation authorized in section 1 hereof shall also be deemed to release the United States from any and all claims for damages whatsoever arising out of withdrawal of lands herein restored to tribal ownership.

SEC. 5. Notwithstanding any other provision of law, the United States shall deposit in the Treasury of the United States to the credit of said tribes, to be available for expenditure for the benefit of said tribes and their members, as provided by the Act of May 19, 1947 (61 Stat. 102), as amended by the Act of August 30, 1951

(65 Stat. 208), and by the act of July 17, 1953 (Public Law 132, Eighty-third Congress), and as may be hereinafter amended, 90 per centum of the gross receipts of the United States, as they are received from time to time, from all leases, bonuses, royalties, or other proceeds derived under the mining and mineral-leasing laws of the United States from any and all lands in which all rights and interests of the tribes are terminated and extinguished by the terms and conditions of section 1 of this Act and which are embraced within the boundaries of the tract described in said section 1. Notwithstanding any other provision of law the remaining 10 per centum of such gross receipts shall be deposited in the Treasury of the United States to the credit of miscellaneous receipts.

SEC. 6. Should this Act become law subsequent to June 30, 1954, there is hereby reserved to the Shoshone and Arapahoe Tribes the privilege of rejecting, within one hundred and twenty days after the date of the Act, the terms and conditions of its sections 1, 4, and 5. If those terms and conditions are rejected, no part of the Act shall become effective.

SEC. 7. The Secretary of the Interior is authorized to perform any and all acts to carry out the provisions and purposes of this Act.

Approved August 15, 1953.

APPENDIX O

EIGHTH PERMANENT RESTORATION ORDER, 13 Fed. Reg. 8818 (1948)

ORDER OF RESTORATION WIND RIVER RESERVATION, WYOMING

WHEREAS, pursuant to the provisions of the Act of March 3, 1905 (33 Stat. 1016), the Shoshone-Arapahoe Tribes of Indians in Wyoming ceded to the United States a large area of their reservation in the State of Wyoming, established under the Treaty of July 3, 1868 (15 Stat. 673), and

WHEREAS, within land use districts Nos. 4, 29, 31 and 32 there remain certain undisposed-of ceded or "opened" lands described as follows:

(Lengthy Legal Description Omitted in Printing)

WHEREAS, no part of the land use district involved are under lease or permit to non-Indians, and

WHEREAS, the Shoshone-Arapahoe Tribes of Indians of the Wind River Reservation require additional grazing lands to support their expanded livestock industry, and

WHEREAS, the Superintendent of the Wind River Reservation and the Commissioner of Indian Affairs have recommended the restoration of the undisposed-of, ceded lands located within the aforesaid land use districts.

NOW, THEREFORE, by virtue of authority vested in the Secretary of the Interior by Section 5 of the Act of July 27, 1939 (53 Stat. 1128-1130), I hereby find that restoration to tribal ownership of the lands described above, which are classified as undisposed-of, ceded lands of the Wind River Reservation, Wyoming, and which total 14,177.73 acres more or less, will be in the tribal interest, and they are hereby restored to tribal owner-

ship for the use and benefit of the Shoshone-Arapahoe Tribes of Indians of the Wind River Reservation, Wyoming, and are added to and made a part of the existing Wind River Reservation, subject to any valid existing rights, and reserves. None of these lands are within any reclamation project.

/s/ William E. Warne
Assistant Secretary of the Interior.

APPENDIX P

SEVENTH PERMANENT RESTORATION ORDER, 10 Fed. Reg. 7542 (1945)

Office of the Secretary,
WIND RIVER RESERVATION, WYO.

ORDER OF RESTORATION

May 29, 1945.

Whereas, pursuant to the provisions of the act of March 3, 1905 (33 Stat. 1016), the Shoshone-Arapahoe Tribes of Indians in Wyoming ceded to the United States a large area of their reservation in the State of Wyoming, established under the Treaty of July 3, 1868 (15 Stat. 673), and

Whereas, within land use district No. 32 there remains certain undisposed of ceded or "opened" land described as follows:

(Lengthy Legal Description Omitted in Printing)

Whereas, no part of the land use district involved is under lease or permit to non-Indians, and

Whereas, the Shoshone-Arapahoe Tribes of Indians of of the Wind River Reservation require additional grazing lands to support their expanded livestock industry, and

Whereas, the Superintendent of the Wind River Reservation and the Commissioner of Indian Affairs have recommended the restoration of the undisposed-of ceded lands located within the aforesaid land use district.

Now, therefore, by virtue of authority vested in the Secretary of the Interior by Section 5 of the act of July 27, 1939 (53 Stat. 1128-1130), I hereby find that restora-

tion to tribal ownership of the lands described above, which are classified as undisposed-of ceded lands of the Wind River Reservation, Wyoming, and which total 2,605.89 acres more or less, will be in the tribal interest, and they are hereby restored to tribal ownership for the use and benefit of the Shoshone-Arapahoe Tribes of Indians of the Wind River Reservation, Wyoming, and are added to and made a part of the existing Wind River Reservation, subject to any valid existing rights, and reserves. None of these lands are within any reclamation project.

OSCAR L. CHAPMAN,
Assistant Secretary of the Interior.

APPENDIX Q

SIXTH PERMANENT RESTORATION ORDER, 10 Fed. Reg. 2254 (1945)

ORDER OF RESTORATION WIND RIVER RESERVATION, WYOMING

WHEREAS, pursuant to the provisions of the Act of March 3, 1905 (33 Stat. 1016), the Shoshone-Arapahoe Tribes of Indians in Wyoming ceded to the United States a large area of their reservation in the State of Wyoming, established under the Treaty of July 3, 1868 (15 Stat. 873), and

WHEREAS, within ten land use districts there remain certain undisposed-of ceded or "opened" lands described as follows:

(Lengthy Legal Description Omitted in Printing)

WHEREAS, no part of the land use districts involved is under lease or permit to non-Indians, and

WHERSAS, the Shoshone-Arapahoe Tribes of Indians of the Wind River Reservation require additional grazing lands to support their expanded livestock industry, and

WHEREAS, the Superintendent of the Wind River Reservation and the Commissioner of Indian Affairs have recommended the restoration of the undispose-of, ceded lands located within the aforesaid land use districts.

NOW, THEREFORE, by virtue of authority vested in the Secretary of the Interior by Section 5 of the Act of July 27, 1939 (53 Stat. 1128-1130), I hereby find that restoration to tribal ownership of the lands described above, which are classified as undisposed-of, ceded lands of the Wind River Reservation, Wyoming, and which

total 10,161.36 acres more or less, will be in the tribal interest, and they are hereby restored to tribal ownership for the use and benefit of the Shoshone-Arapahoe Tribes of Indians of the Wind River Reservation, Wyoming, and are added to and made a part of the existing Wind River Reservation, subject to any valid existing rights, and reserves.

/s/ Oscar L. Chapman
Assistant Secretary of the Interior.

APPENDIX R

FIFTH PERMANENT RESTORATION ORDER, 9 Fed. Reg. 9749 (1944)

ORDER OF RESTORATION WIND RIVER RESERVATION, WYOMING

WHEREAS, pursuant to the provisions of the Act of March 3, 1905 (33 Stat. 1016), the Shoshone-Arapahoe Tribes of Indians in Wyoming ceded to the United States a large area of their reservation in the State of Wyoming, established under the Treaty of July 3, 1868 (15 Stat. 873), and

WHEREAS, within twenty-one land use districts there are certain undisposed-of ceded or "opened" lands described as follows:

(Lengthy Legal Description Omitted in Printing)

WHEREAS, no part of the land use districts involved is under lease or permit to non-Indians, and

WHEREAS, the Shoshone-Arapahoe Tribes of Indians of the Wind River Reservation require additional grazing lands to support their expanded livestock industry, and

WHEREAS, the Superintendent of the Wind River Reservation and the Commissioner of Indian Affairs have recommended the restoration of the undisposed-of, ceded lands located within the aforesaid land use districts.

NOW, THEREFORE, by vitrue of authority vested in the Secretary of the Interior by Section 5 of the Act of July 27, 1939 (53 Stat. 1128-1130), I hereby find that restoration to tribal ownership of the lands described above, which are classified as undisposed-of, ceded lands of the Wind River Reservation, Wyoming, and which total 648,370.74 acres more or less, will be in the tribal

interest, and they are hereby restored to tribal ownership for the use and benefit of the Shoshone-Arapahoe Tribes of Indians of the Wind River Reservation, Wyoming, and are added to and made a part of the existing Wind River Reservation, subject to any valid existing rights.

/s/ Oscar L. Chapman
Assistant Secretary of the Interior.

Apr. 12, 1944

Office of The Secretary.

WIND RIVER RESERVATION, WYO.

ORDER AMENDING ORDER OF RESTORATION 159, 10 Fed. Reg. 2812 (1945)

Pursuant to authority contained in section 5 of the act of July 27, 1939 (53 Stat. 1128-1130), Departmental order of April 12, 1944, published in the FEDERAL REGISTER August 10, 1944, pages 9749 to 9754, inclusive, restoring certain undisposed-of, ceded lands of the Wind River Reservation, Wyoming, to tribal ownership for the use and benefit of the Shoshone-Arapaho Tribes of Indians is hereby amended by eliminating therefrom the following described lands:

(Lengthy Legal Descriptions Omitted in Printing)

The total area withdrawn by the order of April 12, 1944, should be corrected to read 625,218.82 acres instead of 625,298.82 acres.

OSCAR L. CHAPMAN,
Assistant Secretary of the Interior.

FEBRUARY 6, 1945.

APPENDIX S

FOURTH PERMANENT RESTORATION ORDER, 8 Fed. Reg. 6857 (1943)

ORDER OF RESTORATION
WIND RIVER RESERVATION, WYOMING

WHEREAS, pursuant to the provisions of the Act of March 3, 1905 (33 Stat. 1016), the Shoshone-Arapahoe Tribes of Indians in Wyoming ceded to the United States a large area of their reservation in the State of Wyoming, established under the Treaty of July 3, 1868 (15 Stat. 873), and

WHEREAS, within three land use districts, there are certain undisposed-of ceded or "opened" lands described as follows:

(Lengthy Legal Description Omitted in Printing)

WHEREAS, no part of the land use districts involved is under lease or permit to non-Indians, and

WHEREAS, the Shoshone-Arapahoe Tribes of Indians of the Wind River Reservation require additional grazing lands to support their expanded livestock industry, and

WHEREAS, the Superintendent of the Wind River Reservation and the Commissioner of Indian Affairs have recommended the restoration of the undisposed-of, ceded lands located within the aforesaid land use districts.

NOW, THEREFORE, by virtue of authority vested in the Secretary of the Interior by Section 5 of the Act of July 27, 1939 (53 Stat. 1128-1130), I hereby find that restoration to tribal ownership of the lands described above, which are classified as undisposed-of, ceded lands of the Wind River Reservation, Wyoming, and which

total 17,800 acres more or less, will be in the tribal interest, and they are hereby restored to tribal ownership for the use and benefit of the Shoshone-Arapahoe Tribes of Indians of the Wind River Reservation, Wyoming, and are added to and made a part of the existing Wind River Reservation, subject to any valid existing rights.

/s/ Oscar L. Chapman
Assistant Secretary of the Interior.

APPENDIX T

THIRD PERMANENT RESTORATION ORDER, 7 Fed. Reg. 11100 (1942)

DEPARTMENT OF THE INTERIOR
Office of Indian Affairs

WIND RIVER RESERVATION, WYOMING

ORDER RESTORING LANDS TO TRIBAL OWNERSHIP

Whereas pursuant to the provision of the Act of March 3, 1905 (33 Stat. 1016), the Shoshone-Aparahoe Tribes of Indians in Wyoming ceded to the United States a large area of their reservation in the State of Wyoming, established under the Treaty of July 3, 1868 (15 Stat. 673), and

Whereas there is now remaining undisposed-of within the ceded or "opened" portion of the Wind River Reservation, an area estimated to be slightly in excess of 1,000,000 acres of such ceded lands, most of which is urgently required as grazing land for the use of the Shoshone-Arapahoe Tribe of Indians in order properly to support and develop their greatly expanded cattle industry, and

Whereas the Superintendent of the Wind River Reservation and the Commissioner of Indian Affairs have recommended restoration to tribal ownership of all the undisposed-of ceded lands within the following described land use districts of which no part of the land is under lease or permit to non-Indians.

(Lengthy Legal Description Omitted in Printing)

Now, therefore, by virtue of the authority vested in the Secretary of the Interior by section 5 of the Act of

July 27, 1939 (53 Stat. 1128-1130), I hereby find that restoration to tribal ownership of the lands within the area described above, which are classified as undisposed-of ceded land of the Wind River Reservation, Wyoming, will be in the tribal interest, and they are hereby restored to tribal ownership for the use and benefit of the Shoshone-Arapahoe Tribes of Indians of the Wind River Reservation, Wyoming, and are added to and made a part of the existing Wind River Reservation, subject to any valid existing rights.

HAROLD L. ICKES.
Secretary of the Interior.

NOVEMBER 12, 1942.

APPENDIX U

SECOND PERMANENT RESTORATION ORDER,
7 Fed. Reg. 7458; Correction to Regulation 186,
7 Fed. Reg. 9439 (1942)

ORDER OF RESTORATION

Wind River Reservation, Wyoming

WHEREAS, pursuant to the provisions of the Act of March 3, 1905 (33 Stat. 1016), the Shoshone-Arapaho Tribes of Indians in Wyoming ceded to the United States a large area of their reservation in the State of Wyoming, established under the Treaty of July 3, 1888 (15 Stat. 673), and

WHEREAS, there is now remaining undisposed-of within the ceded or "opened" portion of the Wind River Reservation, an area of approximately 1,108,900 acres of such ceded lands, most of which is urgently required as grazing land for the use of the Shoshone-Arapaho Tribes of Indians in order properly to support and develop their greatly expanded cattle industry, and

WHEREAS, the Acting Superintendent of the Wind River Reservation and the Commissioner of Indian Affairs have recommended restoration to tribal ownership of all the undisposed-of ceded lands within the following described land use districts, of which no part of the land is under lease or permit to non-Indians:

(Lengthy Legal Description Omitted in Printing)

NOW, THEREFORE, by virtue of the authority vested in the Secretary of the Interior by Section 5 of the Act of July 27, 1939 (53 Stat. 1128-1130), I hereby find that restoration to tribal ownership of the lands within the

area described above, which are classified as undisposed-of ceded land of the Wind River Reservation, Wyoming, will be in the tribal interest, and they are hereby restored to tribal ownership for the use and benefit of the Shoshone-Arapaho Tribes of Indians of the Wind River Reservation, Wyoming, and are added to and made a part of the existing Wind River Reservation, subject to any valid existing rights.

/s/ Abe Fortas
Acting Secretary of the Interior.

Aug. 28, 1942.

Office of Indian Affairs.

WIND RIVER RESERVATION, WYOMING

ORDER RESTORING LANDS TO TRIBAL OWNERSHIP

Corrections

In the document appearing on page 7458 of the issue for Tuesday, September 22, 1942, the following changes should be made: In Land Use District 13, the third entry under Township 5 North, Range 6 East, should read "Sec. 8, W½", instead of "Sec. 5, W½". In Land Use District 24, the fifth entry under Township 7 North, Range 4 East should read "Secs. 21 to 24 incl.;" instead of "Secs. 21 to 34, incl.;". The second entry under Township 6 North, Range 5 East should read "Secs. 2 to 11, incl.;" instead of "Sec. 15 to 30, incl.;". In Land Use District 44, under Township 5 North, Range 6 East the description under sec. 16 which reads "N½ S¼ SE¼" should read "N½ S½ SE¼". The description under sec. 21 which reads "NW¼ NW¼ SE¼" should read "NW¼ NW¼ NE¼".

APPENDIX V

FIRST PERMANENT RESTORATION ORDER, 5 Fed. Reg. 1805 (1940)

DEPARTMENT OF THE INTERIOR
Office of Indian Affairs
WIND RIVER RESERVATION, WYOMING

ORDER OF RESTORATION

APRIL 17, 1940.

Whereas, pursuant to the provisions of the Act of March 3, 1905 (33 Stat. 1016), the Shoshone-Arapaho Tribes of Indians in Wyoming ceded to the United States a large area of their reservation in the State of Wyoming, established under the Treaty of July 3, 1888 (15 Stat. 673), and

Whereas, there is now remaining undisposed of within the ceded or "opened" portion of the Wind River Reservation, an area of approximately 1,250,000 acres of such ceded lands, most of which is urgently required as grazing land for the use of the Shoshone-Arapaho Tribes of Indians in order to properly support and develop their rapidly expanding cattle industry, and

Whereas, the Tribal Council, the Superintendent of the Wind River Reservation, and the Commissioner of Indian Affairs have recommended restoration to tribal ownership of all the following described undisposed-of ceded lands within established land use districts, of which no part of the land is under lease or permit to non-Indians but only under permits issued to the Indians:

(Lengthy Legal Description Omitted in Printing)

Now, therefore, by virtue of the authority vested in the Secretary of the Interior by section 5 of the Act of July 27, 1939 (53 Stat. 1128-1130), I hereby find that restoration to tribal ownership of the lands described above, which are classified as undisposed-of ceded land of the Wind River Reservation, Wyoming, will be in the tribal interest, and they are hereby restored to tribal ownership for the use and benefit of the Shoshone-Arapaho Tribes of ~~Indians of~~ the Wind River Reservation, Wyoming, and are added to and made a part of the existing Wind River Reservation, subject to any valid existing rights.

[SEAL]

HAROLD L. ICKES,
Secretary of the Interior.

APPENDIX W

Act of June 18, 1934,
Ch. 576, 48 Stat. 984 (1934);
[Current version at 25 U.S.C. §§ 461, 462 (1982)]

AN ACT

To conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

SEC. 2. The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress.

SEC. 3. The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: *Provided, however*, That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act: *Provided further*, That this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation: *Provided further*, That the order of the Department of the Interior signed, dated, and approved by Honorable Ray Lyman Wilbur, as Secretary of the Interior, on

October 28, 1932, temporarily withdrawing lands of the Papago Indian Reservation in Arizona from all forms of mineral entry or claim under the public land mining laws, is hereby revoked and rescinded, and the lands of the said Papago Indian Reservation are hereby restored to exploration and location, under the existing mining laws of the United States, in accordance with the express terms and provisions declared and set forth in the Executive orders establishing said Papago Indian Reservation: *Provided further*, That damages shall be paid to the Papago Tribe for loss of any improvements on any land located for mining in such a sum as may be determined by the Secretary of the Interior but not to exceed the cost of said improvements: *Provided further*, That a yearly rental not to exceed five cents per acre shall be paid to the Papago Tribe for loss of the use or occupancy of any land withdrawn by the requirements of mining operations, and payments derived from damages or rentals shall be deposited in the Treasury of the United States to the credit of the Papago Tribe: *Provided further*, That in the event any person or persons, partnership, corporation, or association, desires a mineral patent, according to the mining laws of the United States, he or they shall first deposit in the Treasury of the United States to the credit of the Papago Tribe the sum of $1.00 per acre in lieu of annual rental, as hereinbefore provided, to compensate for the loss or occupancy of the lands withdrawn by the requirements of mining operations: *Provided further*, That patentee shall also pay into the Treasury of the United States to the credit of the Papago Tribe damages for the loss of improvements not heretofore paid in such a sum as may be determined by the Secretary of the Interior, but not to exceed the cost thereof; the payment of $1.00 per acre for surface use to be refunded to patentee in the event that patent is not acquired.

Nothing herein contained shall restrict the granting or use of permits for easements or rights-of-way; or ingress

or egress over the lands for all proper and lawful purposes; and nothing contained herein, except as expressly provided, shall be construed as authority for the Secretary of the Interior, or any other person, to issue or promulgate a rule or regulation in conflict with the Executive order of February 1, 1917, creating the Papago Indian Reservation in Arizona or the Act of February 21, 1931 (46 Stat. 1202).

SEC. 4. Except as herein provided, no sale, devise, gift, exchange or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: *Provided, however*, That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived or to a successor corporation; and in all instances such lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located or in which the subject matter of the corporation is located, to any member of such tribe or of such corporation or any heirs of such member: *Provided further*, That the Secretary of the Interior may authorize voluntary exchanges of lands of equal value and the voluntary exchange of shares of equal value whenever such exchange, in his judgment, is expedient and beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations.

SEC. 5. The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be

living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona and New Mexico, in the event that the proposed Navajo boundary extension measures now pending in Congress and embodied in the bills (S. 2499 and H.R. 8927) to define the exterior boundaries of the Navajo Indian Reservation in Arizona, and for other purposes, and the bills (S. 2531 and H.R. 8982) to define the exterior boundaries of the Navajo Indian Reservation in New Mexico and for other purposes, or similar legislation, become law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

SEC. 6. The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

SEC. 7. The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided*, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

SEC. 8. Nothing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation now existing or established hereafter.

SEC. 9. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, such sums as may be necessary, but not to exceed $250,000 in any fiscal year, to be expended at the order of the Secretary of the Interior, in defraying the expenses of organizing Indian chartered corporations or other organizations created under this Act.

SEC. 10. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of $10,000,000 to be established as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. Repayment of amounts loaned under this authorization shall be credited to the revolving funds and shall be available for the purposes for which the fund is established. A report shall be made annually to Congress of transactions under this authorization.

SEC. 11. There is hereby authorized to be appropriated, out of any funds in the United States Treasury not

otherwise appropriated, a sum not to exceed $250,000 annually, together with any unexpended balances of previous appropriations made pursuant to this section, for loans to Indians for the payment of tuition and other expenses in recognized vocational and trade schools: *Provided*, That not more than $50,000 of such sum shall be available for loans to Indian students in high schools and colleges. Such loans shall be reimbursable under rules established by the Commissioner of Indian Affairs.

SEC. 12. The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

SEC. 13. The provisions of this Act shall not apply to any of the Territories, colonies, or insular possessions of the United States, except that sections 9, 10, 11, 12, and 16, shall apply to the Territory of Alaska: *Provided*, That Sections 2, 4, 7, 16, 17, and 18 of this Act shall not apply to the following-named Indian tribes, the members of such Indian tribes, together with members of other tribes affiliated with such named tribes located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, Osage, Kaw, Otoe, Tonkawa, Pawnee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomi, Cherokee, Chickasaw, Choctaw, Creek, and Seminole. Section 4 of this Act shall not apply to the Indians of the Klamath Reservation in Oregon.

SEC. 14. The Secretary of the Interior is hereby directed to continue the allowance of the articles enumerated in section 17 of the Act of March 2, 1889 (23 Stat.

L. 894), or their commuted cash value under the Act of June 10, 1896 (29 Stat.L. 334), to all Sioux Indians who would be eligible, but for the provisions of this Act, to receive allotments of lands in severalty under section 19 of the Act of May 29, 1908 (25 Stat.L. 451), or under any prior Act, and who have the prescribed status of the head of a family or single person over the age of eighteen years, and his approval shall be final and conclusive, claims therefor to be paid as formerly from the permanent appropriation made by said section 7 and carried on the books of the Treasury for this purpose. No person shall receive in his own right more than one allowance of the benefits, and application must be made and approved during the lifetime of the allottee or the right shall lapse. Such benefits shall continue to be paid upon such reservation until such time as the lands available therein for allotment at the time of the passage of this Act would have been exhausted by the award to each person receiving such benefits of an allotment of eighty acres of such land.

SEC. 15. Nothing in this Act shall be construed to impair or prejudice any claim or suit of any Indian tribe against the United States. It is hereby declared to be the intent of Congress that no expenditures for the benefit of Indians made out of appropriations authorized by this Act shall be considered as offsets in any suit brought to recover upon any claim of such Indians against the United States.

SEC. 16. Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution

and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

SEC. 17. The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reser-

vation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

SEC. 18. This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after the passage and approval of this Act, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

SEC. 19. The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" whenever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

Approved, June 18, 1934.

RESTORATION OF LANDS FORMERLY INDIAN TO TRIBAL OWNERSHIP

[Instructions]

DEPARTMENT OF THE INTERIOR,
BUREAU OF INDIAN AFFAIRS,
Washington, D.C., August 10, 1934

THE COMMISSIONER OF INDIAN AFFAIRS
TO THE SECRETARY OF THE INTERIOR,

(Through the Commissioner of the General Land Office):

Section 3 of the Act of June 18, 1934 (48 Stat. 981), enacted to conserve and develop Indian lands and resources and for other purposes, contains the following provision:

The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public land laws of the United States: *Provided, however,* That valid rights or claims of any persons to the lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act: *Provided further,* That this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation.

During the early years of our dealings with the Indians, the custom was to have individual or combined nations, tribes, or bands relinquish or cede to the United States large areas claimed by them, for which there was usually a cash or other consideration, and also the setting apart or reserving of certain lands within such ceded areas or from lands belonging to the United States and

located elsewhere. These reserved lands thereafter became the recognized reservation of a tribe or band. In this way the Indian lost all identity with the ceded areas and their rights and interest therein were recognized as having been completely extinguished. In many instances such cession, taken as a whole, embraced practically all of the lands now comprising many of the States of the west.

In years following, for reasons varying on the different reservations, portions of these diminished or newly established reservations were also ceded to the United States, the Indian receiving from the Government in lieu thereof a cash consideration and other benefits. Such transactions were also recognized as carving or separating a certain area from a particular reservation, operating as an extinguishment of the Indian title. In this way the exterior boundaries of a reservation were further reduced. The lands thereby separated from a reservation were no longer looked upon as being a part of that reservation.

This takes us up to the period of about 1890, at which time there was adopted the plan of opening to entry, sale, etc., the lands of reservations that were not needed for allotment, the Government taking over the lands only as trustee for the Indians. Under this plan the Indians were to be credited with the proceeds only as the lands were sold, the United States not to be bound to purchase any portion of the lands so opened. Undisposed of lands of this class remain the property of the Indians until disposed of as provided by law (*Ash Sheep Company* v. *United States*, 252 U.S. 159). Such lands are usually referred to as surplus lands of Indian reservations opened to public entry, and undoubtedly comprise the class of lands from which restorations to tribal ownership are to be made under the said Section 8, if in the public interest. It can safely be said that it would not be to the interest of the public to restore to the Indians all undis-

posed of public lands that at one time were in Indian ownership but afterwards became the property of the United States by outright cessions from the Indian owners, because, as stated above, such action would mean the withdrawal in many States of all lands now available for entry as public domain. Such action undoubtedly would raise strong opposition in the various localities affected and have an undesirable bearing on the new Indian legislation.

In connection with this matter, attention is invited to Section 16 of the same act, which authorizes the formation of tribal organizations and provides that tribes and tribal councils shall have authority "to prevent the sale, disposition, lease, or encumbrance of tribal lands, * * *"; also to Section 18 which authorizes the Indians of any reservation, by a vote of a majority of the adult Indians on the reservation, to exclude themselves from the operation of the entire act, referendum election for such purpose to be held within one year after approval of the act. It, therefore, will be some time before it is known definitely whether the Indians of any of the reservations will exclude themselves from operation under the act, and until tribal organizations can be formed and thereafter definitely determine which of the "opened" Indian reservation lands still undisposed of should be permanently restored to tribal ownership. Tribal organizations should have a voice in deciding which lands should be withheld from disposition. It is understood from informal inquiry in the General Land Office that, although there are "opened" lands on various reservations, there are only a very limited number of reservations where sales can actually be made. Nevertheless, there is a possibility that in the meantime some desirable undisposed of "opened" lands might be entered or filed upon by non-Indians and thereby prevent the restoration of such lands to tribal ownership. For this reason, action should be promptly taken to prevent, for the present, the further disposition of any such lands by public entry, sale,

or otherwise. A withdrawal of this kind would be merely of a temporary nature.

The following is a list of reservations where lands have been opened, the Indians to receive the proceeds of sale only as the tracts are disposed of. As a matter of convenience, citations to treaties, agreements, or acts, under which such "openings" occurred, are also furnished:

ARIZONA	
San Carlos	Agreement of February 25, 1896, ratified by Act of June 10, 1896 (29 Stat. 388)
CALIFORNIA	
Klamath River	Act of June 17, 1892 (27 Stat. 52).
Round Valley	Act of October 1, 1890 (26 Stat. 658).
COLORADO	
Utes	Act of June 15, 1880 (21 Stat. 199).
IDAHO	
Cocui d' Aleor	Act of June 21, 1906 (34 Stat. 335).
MINNESOTA	
Bois Fort	Act of January 14, 1889 (25 Stat. 642).
Deer Creek	Act of January 14, 1889 (25 Stat. 642).
Fond du Lac	Act of January 14, 1889 (25 Stat. 642).
Grand Portage or Pigeon River	Act of January 14, 1889 (25 Stat. 642).
Red Lake	Act of January 14, 1889 (25 Stat. 642).
White Oak Point	Act of January 14, 1889 (25 Stat. 642).
Leech Lake	Act of January 14, 1889 (25 Stat. 642).
MONTANA	
Flathead	Act of April 23, 1904 (33 Stat. 302).
Fort Peck	Act of May 30, 1908 (35 Stat. 558).
Crow	Act of April 27, 1904 (33 Stat. 352).
NORTH DAKOTA	
Fort Berthold	Act of June 1, 1910 (36 Stat. 455).
NORTH AND SOUTH DAKOTA	
Standing Rock	Act of May 29, 1908 (35 Stat. 460).
" "	Act of February 14, 1913 (37 Stat. 675).
OKLAHOMA	
Cheyenne & Arapaho	Act of June 17, 1910 (36 Stat. 533).
Kiowa, Comanche and Apache	Act of June 8, 1906 (34 Stat. 213).

SOUTH DAKOTA	
Cheyenne River	Act of May 29, 1908 (35 Stat. 460).
Lower Brute	Act of August 21, 1906 (34 Stat. 124).
Pine Ridge	Act of May 27, 1910 (36 Stat. 440).
Rosebud	Agreement of September 14, 1901, ratified by Act of April 23, 1904 (33 Stat. 254).
"	Act of March 2, 1907 (34 Stat. 1230).
"	Act of May 30, 1910 (36 Stat. 448).
UTAH	
Ulutah and Quray	Act of May 27, 1902 (32 Stat. 263, as amended).
WASHINGTON	
Colville	Act of March 22, 1906 (34 Stat. 80).
Spokane	Act of May 29, 1908 (36 Stat. 458).
WYOMING	
Wind River	Agreement of April 21, 1904, ratified by Act of March 8, 1905 (33 Stat. 1018).

As a matter of explanation, it may be said that the Klamath River Reservation, mentioned in the list of reservations herewith, was established by Executive Order of November 16, 1855. The surplus lands were opened to settlement, entry and purchase under the laws of the United States by the Act of June 17, 1892 (27 Stat. 52). As a consideration for the lands so opened, the Indians were to receive allotments, village sites, and $1.25 per acre for lands disposed of to certain settlers. Apparently the lands within this "opened" reservation remaining undisposed of at this time are of the class intended for withdrawal and should be retained from disposition until their need for Indian purposes has been investigated.

The Ute lands of Colorado, the areas covered by the Act of June 15, 1880 (21 Stat. 199), as amended by the Act of July 28, 1882 (29 Stat. 178), were deemed to be public lands of the United States and subject to disposal as such. However, the lands were to be sold, the proceeds to be first applied to reimbursing the United States for expenses incurred in connection with administration of the act and the remainder to be deposited in the Treas-

ury of the United States for the benefit of the Indians. In view of this provision, such of these lands as remain undisposed of are also looked upon as being of the class to be temporarily withdrawn from further disposition, as proposed, and, therefore, have been included in the above list.

The Act of May 17, 1900 (31 Stat. 179), provided for free homesteads for the benefit of actual and *bona fide* settlers, and that all sums of money so released from payment of collection, which if not released would have belonged to an Indian tribe, were to be paid to such Indians by the United States. It is, therefore, not intended that this withdrawal shall apply to any lands of this class where the Indians were reimbursed by the United States for the value of such lands in accordance with the said Act of May 17, 1900 (31 Stat. 179).

If there are lands on any of the reservations named, other than the areas covered by the said citations, that were "opened", and for which the Indians receive the proceeds when disposed of, it is intended that they be included in the withdrawal. Areas within regularly authorized reclamation projects are to be excepted.

It is, therefore, recommended that all undisposed of lands of the Indian reservations named above that have been "opened", or authorized to be "opened", to sale, entry, or any other form of disposal under the public land laws, or which are subject to mineral entry and disposal under the mining laws of the United States, with the exception of acres included in reclamation projects, be temporarily withdrawn from disposal of any kind, subject to any and all existing valid rights, until the matter of their permanent restoration to tribal ownership, as authorized by section 3 of the Act of June 18, 1934, *supra*, can be given appropriate consideration. The intention is to withdraw only lands the proceeds of which, if sold, would be deposited in the Treasury of the United

States for the benefit of the Indians. In the event is is found that there are lands of other reservations that should have been included in this proposed withdrawal, appropriate recommendation will be made to have the withdrawal extended to embrace such lands.

JOHN COLLIER, *Commissioner,*

GENERAL LAND OFFICE,
Washington, D.C., September 15, 1934.

There are no reasons known to this Office why the foregoing recommendation should not be approved.

FRED W. JOHNSON, *Commissioner.*

Approved, as recommended, September 19, 1934.

HAROLD L. ICKES,
Secretary of the Interior.

APPENDIX X

Act of March 3, 1905, ch. 1452, 33 Stat. 1016

CHAP. 1452.—An act to ratify and amend an agreement with the Indians residing on the Shoshone or Wind River Indian Reservation in the State of Wyoming and to make appropriations for carrying the same into effect.

Whereas James McLaughlin, United States Indian inspector, did on the twenty-first day of April, nineteen hundred and four, make and conclude an agreement with the Shoshone and Arapahoe Tribes of Indians belonging on the Shoshone or Wind River Reservation in the State of Wyoming, which said agreement is in words and figures as follows:

This agreement made and entered into on the twenty-first day of April, nineteen hundred and four, by and between James McLaughlin, United States Indian inspector, on the part of the United States, and the Shoshone and Arapahoe Tribes of Indians belonging on the Shoshone or Wind River Indian Reservation, in the State of Wyoming, witnesseth:

ARTICLE I. The said Indians belonging on the Shoshone or Wind River Reservation, Wyoming, for the consideration hereinafter named, do hereby cede, grant, and relinquish to the United States, all right, title, and interest which they may have to all the lands embraced within the said reservation, except the lands within and bounded by the following described lines: Beginning in the midchannel of the Big Wind River at a point where said stream crosses the western boundary of the said reservation; thence in a southeasterly direction following the midchannel of the Big Wind River to its conjunction with the Little Wind or Big Popo-Agie River, near the northeast corner of township one south, range four east; thence up the midchannel of the said Big Popo-Agie

River in a southwesterly direction to the mouth of the North Fork of the said Big Popo-Agie River; thence up the midchannel of said North Fork of the Big Popo-Agie River to its intersection with the southern boundary of the said reservation, near the southwest corner of section twenty-one township two south, range one west; thence due west along the said southern boundary of the said reservation to the southwest corner of the same; thence north along the western boundary of said reservation to the place of beginning: *Provided:* That any individual Indian, a member of the Shoshone or Arapahoe Tribes, who has, under existing laws or treaty stipulations, selected a tract of land within the portion of said reservation hereby ceded, shall be entitled to have the same allotted and confirmed to him or her, and any Indian who has made or received an allotment of land within the ceded territory shall have the right to surrender such allotment and select other lands within the diminished reserve in lieu thereof at any time before the lands hereby ceded shall be opened for entry.

ARTICLE II. In consideration of the lands ceded, granted, relinquished, and conveyed by Article I of this agreement, the United States stipulates and agrees to dispose of the same as hereinafter provided under the provisions of the homestead, town-site, coal, and mineral land laws, or by sale for cash as hereinafter provided at the following prices per acre: All lands entered under the homestead law within two years after the same shall be opened for entry shall be paid for at the rate of one dollar and fifty cents per acre; after the expiration of this period, two years, all lands entered under the homestead law, within three years therefrom, shall be paid for at the rate of one dollar and twenty-five cents per acre; that all homestead entrymen who shall make entry of the lands herein ceded, within two years after the opening of the same to entry, shall pay one dollar and fifty cents per acre for the land embraced in their entry, and for

all of the said lands thereafter entered under the homestead law, the sum of one dollar and twenty-five cents per acre shall be paid; payment in all cases to be made as follows: Fifty cents per acre at the time of making entry and twenty-five cents per acre each year thereafter until the price per acre hereinbefore provided shall have been fully paid; that lands entered under the town-site, coal, and mineral land laws shall be paid for in an amount and manner as provided by said laws; and in case any entrymen fails to make the payments herein provided for or any of them, within the time stated, all rights of the said entryman to the lands covered by his or her entry shall at once cease and any payments therebefore made shall be forfeited, and the entry shall be forfeited and canceled, unless the Secretary of the Interior shall in his discretion, and for good cause, excuse for not exceeding six months, the said failure, application for which must be made by the settler on or before the date of the payment which would bring him or her in default, and all lands except mineral and coal lands herein ceded, remaining undisposed of at the expiration of five years from the opening of said lands to entry, shall be sold to the highest bidder for cash at not less than one dollar per acre under the rules and regulations to be prescribed by the Secretary of the Interior: *Provided*, That any lands remaining unsold eight years after the said lands shall have been opened to entry may be sold to the highest bidder for cash without regard to the above minimum limit of price; that lands disposed of under the town-site, coal, and mineral land laws shall be paid for at the prices provided for by law, and the United States agrees to pay the said Indians the proceeds derived from the sales of said lands, and also to pay the said Indians the sum of one dollar and twenty-five cents per acre for sections sixteen and thirty-six, or an equivalent of two sections in each township of the ceded lands, the amounts so realized to be paid to and expended for said Indians in the manner hereinafter provided.

ARTICLE III. It is further agreed that of the amount to be derived from the sale of said lands, as stipulated in Article II of this agreement, the sum of eighty-five thousand dollars shall be devoted to making a per capita payment to the said Indians of fifty dollars each in cash within sixty days after the opening of the ceded lands to settlement, or as soon thereafter as such sum shall be available, which per capita payment shall be from the proceeds of the sale of sections sixteen and thirty-six or an equivalent of two sections in each township within the ceded territory, and which sections are to be paid for by the United States at the rate of one dollar and twenty-five cents per acre: *And provided further*, That upon the completion of the said fifty dollars per capita payment, any balance remaining in the said fund of eighty-five thousand dollars, shall at once become available and shall be devoted to surveying, platting, making of maps, payment of the fees, and the performance of such acts as are required by the statutes of the State of Wyoming in securing water rights from said State for the irrigation of such lands as shall remain the property of said Indians, whether located within the territory intended to be ceded by this agreement or within the diminished reserve.

ARTICLE IV. It is further agreed that of the moneys derived from the sale of said lands the sum of one hundred and fifty thousand dollars, or so much thereof as may be necessary, shall be expended under the direction of the Secretary of the Interior for the construction and extension of an irrigation system within the diminished reservation for the irrigation of the lands of the said Indians: *Provided*, That in the employment of persons for the construction, enlargement, repair and management of such irrigation system, members of the said Shoshone and Arapahoe Tribes shall be employed wherever practicable.

ARTICLE V. It is agreed that at least fifty thousand dollars of the moneys derived from the sale of the ceded

lands shall be expended, under the direction of the Secretary of the Interior, in the purchase of live stock for issue to said Indians, to be distributed as equally as possible among the men, women, and children of the Shoshone or Wind River Reservation.

ARTICLE VI. It is further agreed that the sum of fifty thousand dollars of the moneys derived from the sales of said ceded lands shall be set aside as a school fund, the principal and interest on which at four per centum per annum shall be expended under the direction of the Secretary of the Interior for the erection of school buildings and maintenance of schools on the diminished reservation, which schools shall be under the supervision and control of the Secretary of the Interior.

ARTICLE VII. It is further agreed that all the moneys received in payment for the lands hereby ceded and relinquished, not set aside as required for the various specific purposes and uses herein provided for, shall constitute a general welfare and improvement fund, the interest on which at four per centum per annum shall be annually expended under the direction of the Secretary of the Interior for the benefit of the said Indians; the same to be expended for such purposes and in the purchase of such articles as the Indians in council may decide upon and the Secretary of the Interior approve: *Provided, however,* That a reasonable amount of the principal of said fund may also be expended each year for the erection, repair, and maintenance of bridges needed on the reservation, in the subsistence of indigent and infirm persons belonging on the reservation, or for such other purposes for the comfort, benefit, improvement, or education of said Indians as the Indians in council may direct and the Secretary of the Interior approve. And it is further agreed that an accounting shall be made to said Indians in the month of July in each year until the lands are fully paid for, and the funds hereinbefore referred to shall, for the period of ten years after the

opening of the lands herein ceded to settlement, be used in the manner and for the purposes herein provided, and the future disposition of the balance of said funds remaining on hand shall then be the subject of further agreement between the United States and the said Indians.

ARTICLE VIII. It is further agreed that the proceeds received from the sales of said lands, in conformity with the provisions of this agreement, shall be paid into the Treasury of the United States and paid to the Indians belonging on the Shoshone or Wind River Reservation, or expended on their account only as provided in this agreement.

ARTICLE IX. It is understood that nothing in this agreement contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township or to dispose of said land except as provided herein, or to guarantee to find purchasers for said land or any portion thereof, it being the understanding that the United States shall act as trustee for said Indians to dispose of said lands and to expend for said Indians and pay over to them the proceeds received from the sale thereof only as received, as herein provided.

ARTICLE X. It is further understood that nothing in this agreement shall be construed to deprive the said Indians of the Shoshone or Wind River Reservation, Wyoming, of any benefits to which they are entitled under existing treaties or agreement, not inconsistent with the provisions of this agreement.

ARTICLE XI. This agreement shall take effect and be in force when signed by U.S. Indian Inspector James McLaughlin and by a majority of the male adult Indians parties hereto, and when accepted and ratified by the Congress of the United States.

In witness whereof the said James McLaughlin, U.S. Indian Inspector, on the part of the United States, and the male adult Indians belonging on the Shoshone or Wind River Indian Reservation, Wyoming, have hereunto set their hands and seals at the Shoshone Agency, Wyoming, this twenty-first day of April, A.D. ninteen hundred and four.

JAMES MCLAUGHLIN [SEAL.]
U.S. Indian Inspector.

No.	Name	Age	Mark	Tribe
1	George Terry	48		Shoshone (Seal)
2	Myron Hunt	48	X	" (Seal)
	(And 280 more Indian signatures.)			

We, the undersigned, hereby certify that the foregoing agreement was fully explained by us in open council to the Indians of the Shoshone or Wind River Reservation, Wyoming; that it was fully understood by them before signing, and that the agreement was duly executed and signed by 282 of said Indians.

CHARLES LAHOE,
Shoshone Interpreter.

MICHAEL MANSON,
Arapahoe Interpreter.

SHOSHONE AGENCY, WYOMING,

April 22, 1904.

We, the undersigned, do hereby certify that we witnessed the signatures of James McLaughlin, U.S. Indian Inspector, and of the two hundred and eighty-two (282) Indians of the Shoshone or Wind River Reservation, Wyoming, to the foregoing agreement.

JOHN ROBERTS,
Missionary of the Protestant Episcopal
Church on the Reservation

JOHN S. CHURCHWARD,
Assistant Clerk, Shoshone Agency, Wyo.

SHOSHONE AGENCY, WYOMING,

April 22nd, 1904.

I hereby certify that the total number of male adult Indians, over eighteen (18) years of age, belonging on the Shoshone or Wind River Reservation, Wyoming, is four hundred and eighty-four (484), of whom two hundred and eighty-two (282) have signed the foregoing agreement.

H. E. WADSWORTH,
U.S. Indian Agent.

SHOSHONE AGENCY, WYOMING,

April 22nd, 1904.

Therefore

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the said agreement be, and the same is hereby, accepted, ratified, and confirmed, except as to Articles II, III, and IX, which are amended and modified

as follows, and as amended and modified are accepted, ratified, and confirmed:

ARTICLE II. In consideration of the lands ceded, granted, relinquished, and conveyed by Article I of this agreement, the United States stipulates and agrees to dispose of the same, as hereinafter provided, under the provisions of the homestead, town-site, coal and mineral land laws, or by sale for cash, as hereinafter provided, at the following prices per acre: All lands entered under the homestead law within two years after the same shall be opened for entry shall be paid for at the rate of one dollar and fifty cents per acre; after the expiration of this period, two years, all lands entered under the homestead law within three years therefrom shall be paid for at the rate of one dollar and twenty-five cents per acre; that all homestead entrymen who shall make entry of the lands herein ceded within two years after the opening of the same to entry shall pay one dollar and fifty cents per acre for the land embraced in their entry, and for all of the said lands thereafter entered under the homestead law the sum of one dollar and twenty-five cents per acre shall be paid; payment in all cases to be made as follows: Fifty cents per acre at the time of making entry and twenty-five cents per acre each year thereafter until the price per acre hereinbefore provided shall have been fully paid; that lands entered under the town-site, coal and mineral land laws shall be paid for in an amount and manner as provided by said laws; and in case any entryman fails to make the payments herein provided for, or any of them, within the time stated, all rights of the said entryman to the lands covered by his or her entry shall at once cease and any payments therebefore made shall be forfeited and the entry shall be held for cancellation and canceled, and all lands, except mineral and coal lands herein ceded, remaining undisposed of at the expiration of five years from the opening of said lands to entry shall be sold to the highest bidder for

cash, at not less than one dollar per acre, under rules and regulations to be prescribed by the Secretary of the Interior: *And provided*, That nothing herein contained shall impair the rights under the lease to Asmus Boysen, which has been approved by the Secretary of the Interior; but said lessee shall have for thirty days from the date of the approval of the surveys of said land a preferential right to locate, following the Government surveys, not to exceed six hundred and forty acres in the form of a square, of mineral or coal lands in said reservation; that said Boysen at the time of entry of such lands shall pay cash therefore at the rate of ten dollars per acre and surrender said lease and the same shall be canceled: *Provided further*, That any lands remaining unsold eight year after the said lands shall have been opened to entry may be sold to the highest bidder for cash without regard to the above minimum limit of price; that lands disposed of under the town-site, coal and mineral land laws shall be paid for at the prices provided for by law, and the United States agrees to pay the said Indians the proceeds derived from the sales of said lands, the amount so realized to be paid to and expended for said Indians in the manner hereinafter provided.

ARTICLE III. It is further agreed that of the amount to be derived from the sale of said lands, as stipulated in Article II of this agreement, the sum of eighty-five thousand dollars shall be devoted to making a per capita payment to the said Indians of fifty dollars each in cash within sixty days after the opening of the ceded lands to settlement, or as soon thereafter as such sum shall be available: *And provided further*, That upon the completion of the said fifty dollars per capita payment any balance remaining in the said fund of eighty-five thousand dollars shall at once become available and shall be devoted to surveying, platting, making of maps, payment of the fees, and the performance of such acts as are required by the statutes of the State of Wyoming in secur-

ing water rights from said State for the irrigation of such lands as shall remain the property of said Indians, whether located within the territory intended to be ceded by this agreement or within the diminished reserve.

ARTICLE IX. It is understood that nothing in this agreement contained shall in any manner bind the United States to purchase any portion of the lands herein described or to dispose of said lands except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the understanding that the United States shall act as trustee for said Indians to dispose of said lands and to expend for said Indians and pay over to them the proceeds received from the sale thereof only as received, as herein provided.

SEC. 2. That the lands ceded to the United States under the said agreement shall be disposed of under the provisions of the homestead, town-site, coal and mineral land laws of the United States and shall be opened to settlement and entry by proclamation of the President of the United States on June fifteenth, nineteen hundred and six, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, and enter said lands except as prescribed in said proclamation until after the expiration of sixty days from the time when the same are opened to settlement and entry, and the rights of honorably discharged Union soldiers and sailors of the late civil and of the Spanish wars, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States as amended by the act of March first, nineteen hundred and one, shall not be abridged.

All homestead entrymen who shall make entry of the lands herein ceded within two years after the opening

of the same to entry shall pay one dollar and fifty cents per acre for the land embraced in their entry, and for all of the said lands thereafter entered under the homestead law the sum of one dollar and twenty-five cents per acre shall be paid, payment in all cases to be made as follows: Fifty cents per acre at the time of making entry and twenty-five cents per acre each year thereafter until the price per acre hereinbefore provided shall have been fully paid. Upon all entries the usual fees and commissions shall be paid as provided for in homestead entries on lands the price of which is one dollar and twenty-five cents per acre. Lands entered under the town-site, coal, and mineral land laws shall be paid for in amount and manner as provided by said laws. Notice of location of all mineral entries shall be filed in the local land office of the district in which the lands covered by the location are situated, and unless entry and payment shall be made within three years from the date of location all rights thereunder shall cease; and in case any entryman fails to make the payments herein provided for, or any of them, within the time stated, all rights of the said entryman to the lands covered by his or her entry shall cease, and any payments therebefore made shall be forfeited, and the entry shall be held for cancellation and canceled; that nothing in this act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one of the Revised Statutes of the United States by paying for the land entered the price fixed herein; that all lands, except mineral and coal lands, herein ceded remaining undisposed of at the expiration of five years from the opening of said lands to entry shall be sold to the highest bidder for cash at not less than one dollar per acre under rules and regulations to be prescribed by the Secretary of the Interior: *Provided*, That any lands remaining unsold eight years after the said lands shall have been opened to entry may be sold to the highest bidder for cash without regard to the above minimum limit of price.

SEC. 3. That there is hereby appropriated, out of any money in the Treasury of the United States not otherwise appropriated, the sum of eighty-five thousand dollars to make the per capita payment provided in article three of the agreement herein ratified, the same to be reimbursed from the first money received from the sale of the lands herein ceded and relinquished. And the sum of thirty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury of the United States not otherwise appropriated, the same to be reimbursed from the proceeds of the sale of said lands, for the survey and field and office examination of the unsurveyed portion of the ceded lands, and the survey and marking of the outboundaries of the diminished reservation, where the same is not a natural water boundary; and the sum of twenty-five thousand dollars is hereby appropriated out of any money in the Treasury of the United States not otherwise appropriated, the same to be reimbursed from the proceeds of the sale of said lands, to be used in the construction and extension of an irrigation system on the diminished reserve, as provided in article four of the agreement.

Approved, March 3, 1905.

APPENDIX Y

Wyoming Admission Act, 26 Stat. 222, (July 10, 1890)

CHAP. 664.—An act to provide for the admission of the State of Wyoming into the Union, and for other purposes.

Whereas, the people of the Territory of Wyoming did, on the thirtieth day of September, eighteen hundred and eighty-nine, by a convention of delegates called and assembled for that purpose, form for themselves a constitution, which constitution was ratified and adopted by the people of said Territory at the election held therefor on the first Tuesday in November, eighteen hundred and eighty-nine, which constitution is republican in form and is in conformity with the Constitution of the United States; and

Whereas, said convention and the people of the said Territory have asked the admission of said Territory into the Union of States on an equal footing with the original States in all respects whatever; Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the State of Wyoming is hereby declared to be a State of the United States of America, and is hereby declared admitted into the Union on an equal footing with the original States in all respects whatever; and that the constitution which the people of Wyoming have formed for themselves be, and the same is hereby, accepted, ratified, and confirmed.

SEC. 2. That the said State shall consist of all the territory included within the following boundaries, to wit: Commencing at the intersection of the twenty-seventh meridian of longitude west from Washington with the

forty-fifth degree of north latitude and running thence west to the thirty-fourth meridian of west longtitude; thence south to the forty-first degree of north latitude; thence east to the twenty-seventh meridian of west longitude, and thence north to the place of beginning: *Provided*, That nothing in this act contained shall repeal or affect any act of Congress relating to the Yellowstone National Park, or the reservation of the park as now defined, or as may be hereafter defined or extended, or the power of the United States over it; and nothing contained in this act shall interfere with the right and ownership of the United States in said park and reservation as it now is or may hereafter be defined or extended by law; but exclusive legislation, in all cases whatsoever, shall be exercised by the United States, which shall have exclusive control and jurisdiction over the same; but nothing in this proviso contained shall be construed to prevent the service within said park of civil and criminal process lawfully issued by the authority of said State; and the said State shall not be entitled to select indemnity school lands for the sixteenth and thirty-sixth sections that may be in said park reservation as the same is now defined or may be hereafter defined.

SEC. 3. That until the next general census, or until otherwise provided by law, said State shall be entitled to one Representative in the House of Representatives of the United States, and the election of the Representative to the Fifty-first Congress and the Representative to the Fifty-second Congress shall take place at the time and be conducted and certified in the same manner as is provided in the constitution of the State for the election of State, district, and other officers.

SEC. 4. That sections numbered sixteen and thirty-six in every township of said proposed State, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions

of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That section six of the act of Congress of August ninth, eighteen hundred and eighty-eight, entitled "An act to authorize the leasing of the school and university lands in the Territory of Wyoming, and for other purposes," shall apply to the school and university indemnity lands of the said State of Wyoming so far as applicable.

SEC. 5. That all lands herein granted for educational purposes shall be disposed of only at public sale, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulations as the legislature shall prescribe, be leased for periods of not more than five years, in quantities not exceeding one section to any one person or company; and such land shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only.

SEC. 6. That fifty sections of the unappropriated public lands within said State, to be selected and located in legal subdivisions as provided in section four of this act, shall be, and are hereby, granted to said State for the purpose of erecting public buildings at the capital of said State.

SEC. 7. That five per centum of the proceeds of the sales of public lands lying within said State which shall be sold by the United States subsequent to the admission of said State into the Union, after deducting all the expenses incident to the same, shall be paid to the said State, to be used as a permanent fund, the interest of

which only shall be expended for the support of the common schools within said State.

SEC. 8. That the lands granted to The Territory of Wyoming by the act of February eighteenth, eighteen hundred and eigthy-one, entitled "An act to grant lands to Dakota, Montana, Arizona, Idaho, and Wyoming for university purposes," are hereby vested in the State of Wyoming, to the extent of the full quantity of seventy-two sections to said State, and any portion of said lands that may not have been selected by said Territory of Wyoming may be selected by the said State; but said act of February eighteenth, eighteen hundred and eighty-one, shall be so amended as to provide that none of said lands shall be sold for less than ten dollars per acre, and the proceeds shall constitute a permanent fund to be safely invested and held by said State and the income thereof be used exclusively for university purposes. The schools, colleges, and universities provided for in this act shall forever remain under the exclusive control of the said State, and no part of the proceeds arising from the sale or disposal of any lands herein granted for educational purposes shall be used for the support of any sectarian or denominational school, college, or university. The section of land granted by the act of May twenty-eighth, eighteen hundred and eighty-eight, to the Territory of Wyoming for a fish hatchery and other public purposes shall, upon the admission of said State of Wyoming into the Union, become the property of said State.

SEC. 9. That the penitentiary at Laramie City, Wyoming, and all lands connected therewith and set apart and reserved therefore, and the personal property of the United States now being in the Territory of Wyoming and which has been in use in the said Territory in the administration of the Territorial government, including books and records, and the property used at the Constitutional Convention which convened at Cheyenne, in the month of September, eighteen hundred and eighty-

nine, are hereby granted and donated, and unexpended appropriations of money therefor, are hereby granted and donated to the State of Wyoming.

SEC. 10. That ninety thousand acres of land, to be selected and located as provided in section four of this act, are hereby granted to said State for the use and support of an agriculture college in said State as provided in the acts of Congress making donations of lands for such purposes.

SEC. 11. That in lieu of the grant of land for purposes of internal improvement made to new States by the eighth section of the act of September fourth, eighteen hundred and forty-one, which section is hereby repealed as to the State of Wyoming, and in lieu of any claim or demand by the said State under the act of September twenty-eighth, eighteen hundred and fifty, and section twenty-four hundred and seventy-nine of the Revised Statutes, making a grant of swamp and overflowed lands to certain States, which grant it is hereby declared is not extended to the State of Wyoming, and in lieu of any grant of saline lands to said State, the following grants of lands are hereby made, to wit:

To the State of Wyoming: For the establishment and maintenance and support in the said State of the insane asylum in Uinta County, thirty thousand acres; for the penal, reform, or educational institution in course of construction in Carbon County, thirty thousand acres; for the penitentiary in Albany County, thirty thousand acres; for the fish-hatchery in Albany County, five thousand acres; for the deaf, dumb, and blind asylum in Laramie County, thirty thousand acres; for the poor farm in Fremont County, ten thousand acres; for a hospital for miners who shall become disabled or incapacitated to labor while working in the mines of the State, thirty thousand acres; for public buildings at the capital of the State, in addition to those hereinbefore granted for that pur-

pose, seventy-five thousand acres; for State charitable, educational, penal, and reformatory institutions, two hundred and sixty thousand acres, making a total of five hundred thousand acres: *Provided*, That none of the lands granted by this act shall be sold for less than ten dollars per acre.

SEC. 12. That the State of Wyoming shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this act; and the lands granted by this section shall be held, appropriated, and disposed of exclusively for the purposes herein mentioned, in such manner as the legislature of the State may provide.

SEC. 13. That all mineral lands shall be exempted from the grants made by this act. But if sections sixteen and thirty-six, or any subdivision or portion of any smallest subdivision thereof in any township, shall be found by the Department of the Interior to be mineral lands, said State is hereby authorized and empowered to select, in legal subdivisions, an equal quantity of other unappropriated lands in said State in lieu thereof, for the use and the benefit of the common schools of said State.

SEC. 14. That all lands granted in quantity or as indemnity by this act shall be selected, under the direction of the Secretary of the Interior, from the surveyed, unreserved and unappropriated public lands of the United States within the limits of the State entitled thereto. And there shall be deducted from the number of acres of land donated by this act for specific objects to said State the number of acres heretofore donated by Congress to said Territory for similar objects.

SEC. 15. That the sum of thirty thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to said Territory for defraying the expenses of the said convention and for the payment of the mem-

bers thereof, under the same rules and regulations and at the same rates as are now provided by law for the payment of the Territorial legislatures, and for the elections held therefor and thereunder. Any money hereby appropriated not necessary for such purpose shall be covered into the Treasury of the United States.

SEC. 16. That the said State, when admitted as aforesaid, shall constitute a judicial district, the name thereof to be the same as the name of the State; and the circuit and district courts therefor shall be held at the capital of the State for the time being, and the said district shall, for judicial purposes, until otherwise provided, be attached to the eighth judicial circuit. There shall be appointed for said district one district judge, one United States attorney, and one United States marshal. The judge of said district shall receive a yearly salary of three thousand five hundred dollars, payable in four equal installments, on the first days of January, April, July, and October of each year and shall reside in the district.

There shall be appointed clerks of said courts in the said district, who shall keep their offices at the capital of said State. The regular terms of said courts shall be held in said district at the place aforesaid on the first Monday in April and the first Monday in November of each year, and only one grand jury and one petit jury shall be summoned in both said circuit and district courts. The circuit and district courts for said district, and the judges thereof, respectively shall possess the same powers and jurisdiction, and perform the same duties required to be performed by the other circuit and district courts and judges of the United States, and shall be governed by the same laws and regulations. The marshal, district attorney, and clerks of the circuit and district courts of said district, and all other officers and persons performing duties in the administration of justice therein, shall severally possess the powers and perform the duties lawfully possessed and required to be performed by similar

officers in other districts of the United States; and shall, for the services they may perform, receive the fees and compensation allowed by law to other similar officers and persons performing similar duties in the State of Oregon.

SEC. 17. That all cases of appeal or writ of error heretofore prosecuted and now pending in the Supreme Court of the United States upon any record from the supreme court of said Territory, or that may hereafter lawfully be prosecuted upon any record from said courts, may be heard and determined by said Supreme Court of the United States. And the mandate of execution or of further proceedings shall be directed by the Supreme Court of the United States to the circuit or district court hereby established within the said State from or to the supreme court of such State, as the nature of the case may require. And the circuit, district, and State courts herein named shall, respectively, be the successor of the supreme court of the Territory, as to all such cases arising within the limits embraced within the jurisdiction of such courts, respectively, with full power to proceed with the same, and award mesne or final process therein; and that from all judgments and decrees of the supreme court of the Territory mentioned in this act, in any case arising within the limits of the proposed State prior to admission, the parties to such judgment shall have the same right to prosecute appeals and writs of error to the Supreme Court of the United States as they shall have had by law prior to the admission of said State into the Union.

SEC. 18. That in respect to all cases, proceedings, and matters now pending in the supreme or district courts of the said Territory at the time of the admission into the Union of the State of Wyoming and arising within the limits of such State, whereof the circuit or district court by this act established might have had jurisdiction under the laws of the United States had such courts existed at the time of commencement of such cases, the said circuit

and district court, respectively, shall be the successors of said supreme and district courts of said Territory; and in respect to all other cases, proceedings, and matters pending in the supreme or district courts of the said Territory at the time of the admission of such Territory into the Union, arising within the limits of said State, the courts established by such State shall, respectively, be the successors of said supreme and district Territorial courts; and all the files, records, indictments, and proceedings relating to any such cases shall be transferred to such circuit, district, and State courts, respectively, and the same shall be proceeded with therein in due course of law; but no writ, action, indictment, cause, or proceeding now pending, or that prior to the admission of the State shall be pending, in any Territorial court in said Territory shall abate by the admission of such State into the Union, but the same shall be transferred and proceeded with in the proper United States circuit, district, or State court, as the case may be: *Provided, however*, That in all civil actions, causes, and proceedings in which the United States is not a party, transfers shall not be made to the circuit and district court of the United States except upon written request of one of the parties to such action or proceeding filed in the proper court; and in the absence of such request such cases shall be proceeded with in the proper State courts.

SEC. 19. That the legislature of the said State may elect two Senators of the United States as is provided by the constitution of said State, and the Senators and Representatives of said State shall be entitled to be admitted to seats in Congress and to all the rights and privileges of Senators and Representatives of other States in the Congress of the United States.

SEC. 20. That until the State officers are elected and qualified under the provisions of the constitution of said State, the officers of the Territory of Wyoming shall discharge the duties of their respective offices under the

constitution of the State, in the manner and form as therein provided.

SEC. 21. That from and after the admission of said State into the Union, in pursuance of this act, the laws of the United States, not locally inapplicable, shall have the same force and effect within the said State as elsewhere within the United States; and all laws in force made by said Territory, at the time of its admission into the Union, until amended or repealed, shall be in force in said State, except as modified or changed by this act or by the constitution of the State, and all acts or parts of acts in conflict with the provisions of this act, whether passed by a legislature of said Territory or by Congress, are hereby repealed.

Approved, July 10, 1890.

APPENDIX Z

WYO. CONST. ART. VIII, §§1,3

§ 1. Water is state property.

The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state.

* * * *

§ 3. Priority of appropriation.

Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests.

APPENDIX AA

SECOND TREATY OF FORT BRIDGER,

15 Stat. 673 (1868)

Treaty between the United States of America and the Eastern Band of Shoshonees and the Bannack Tribe of Indians; Concluded, July 3, 1868; *Ratification advised, February* 16, 1869; *Proclaimed, February* 24, 1869.

ANDREW JOHNSON,

PRESIDENT OF THE UNITED STATES OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS a treaty was made and concluded at Fort Bridger, in the Territory of Utah, on the third day of July, in the year of our Lord one thousand eight hundred and sixty-eight, by and between Nathaniel G. Taylor, William T. Sherman, William S. Harney, John S. Sanborn, S. F. Tappan, C. C. Augur, and Alfred H. Terry, commissioners, on the part of the United States, and Wash-a-kie, Wau-ni-pitz, and other chiefs and headmen of the Eastern Band of Shoshonee Indians, and Tag-gee, Tay-to-ba, and other chiefs and headmen of the Bannack tribe of Indians, on the part of said band and tribe of Indians respectively, and duly authorized thereto by them, which treaty is in the words and figures following, to wit:

Articles of a Treaty with the Shoshonee (Eastern Band) and Bannack Tribes of Indians, made the third Day of July, 1868, *at Fort Bridger, Utah Territory.*

Articles of a treaty made and concluded at Fort Bridger, Utah Territory, on the third day of July, in the year

of our Lord one thousand eight hundred and sixty-eight, by and between the undersigned commissioners on the part of the United States, and the undersigned chiefs and headmen of and representing the Shoshonee (eastern band) and Bannack tribes of Indians, they being duly authorized to act in the premises:

ARTICLE I. From this day forward, peace between the parties to this treaty shall forever continue. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they hereby pledge their honor to maintain it.

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, on proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws; and in case they wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other money's due or to become due to them under this or other treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no such damages shall be adjusted and paid until thoroughly

examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss while violating or because of his violating the provisions of this treaty or the laws of the United States shall be reimbursed therefor.

ARTICLE II. It is agreed that whenever the Bannacks desire a reservation to be set apart for their use, or whenever the President of the United States shall deem it advisable for them to be put upon a reservation, he shall cause a suitable one to be selected for them in their present country, which shall embrace reasonable portions of the "Port neuf" and "Kansas Prarie" countries, and that, when this reservation is declared, the United States will secure to the Bannacks the same rights and privileges therein, and make the same and like expenditures therein for their benefit, except the agency house and residence of agent, in proportion to their numbers, as herein provided for the Shoshonee reservation. The United States further agrees that the following district of country, to wit: commencing at the mouth of Owl creek and running due south to the crest of the divide between the Sweetwater and Papo Agie rivers; thence along the crest of said divide and the summit of Wind River mountains to the longitude of North Fork of Wind river; thence due north to mouth of said North Fork and up its channel to a point twenty miles above its mouth; thence in a straight line to head-waters of Owl creek and along middle of channel of Owl creek to place of beginning, shall be and the same is set apart for the absolute and undisturbed use and occupation of the Shoshonee Indians within named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employees of the government as may be authorized

to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth they will and do hereby relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid.

ARTICLE III. The United States agrees, at its own proper expense, to construct at a suitable point on the Shoshonee reservation a warehouse or storeroom for the use of the agent in storing goods belonging to the Indians, to cost not exceeding two thousand dollars; an agency building for the residence of the agent, to cost not exceeding three thousand; a residence for the physician, to cost not more than two thousand dollars; and five other buildings, for a carpenter, farmer, blacksmith, miller, and engineer, each to cost not exceeding two thousand dollars; also a schoolhouse or mission building so soon as a sufficient number of children can be induced by the agent to attend school, which shall not cost exceeding twenty-five hundred dollars.

The United States agrees further to cause to be erected on said Shoshonee reservation, near the other buildings herein authorized, a good steam circular saw-mill, with a grist-mill and shingle machine attached, the same to cost not more than eight thousand dollars.

ARTICLE IV. The Indians herein named agree, when the agency house and other buildings shall be constructed on their reservations named, they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.

ARTICLE V. The United States agrees that the agent for said Indians shall in the future make his home at the agency building on the Shoshonee reservation, but shall direct and supervise affairs on the Bannack reservation; and shall keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by and against the Indians as may be presented for investigation under the provisions of their treaty stipulations, as also for the faithful discharge of other duties enjoined by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

ARTICLE VI. If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within the reservation of his tribe, not exceeding three hundred and twenty acres in extent, which tract so selected, certified, and recorded in the "land book," as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above described. For each tract of land so selected a certificate, containing a description thereof, and the name of the person selecting it, with a certificate endorsed thereon that the same has been recorded, shall be delievered to the party entitled to it by the agent, after the same shall have been recorded by him in a book

to be kept in his office subject to inspection, which said book shall be known as the "Shoshonee (eastern band) and Bannack Land Book."

The President may at any time order a survey of these reservations, and when so surveyed Congress shall provide for protecting the rights of the Indian settlers in these improvements, and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property as between Indians, and on all subjects connected with the government of the Indians on said reservations, and the internal police thereof, as may be thought proper.

ARTICLE VI. In order to insure the civilization of the tribes entering into this treaty, the necessity of education is admitted, especially of such of them as are or may be settled on said agricultural reservations, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for twenty years.

ARTICLE VIII. When the head of a family or lodge shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of three years more, he shall be en-

titled to receive seeds and implements as aforesaid in value twenty-five dollars per annum.

And it is further stipulated that such persons as commence farming shall receive instructions from the farmers herein provided for, and whenever more than one hundred persons on either reservation shall enter upon the cultivation of the soil, a second blacksmith shall be provided, with such iron, steel, and other material as may be required.

ARTICLE IX. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named, under any and all treaties heretofore made with them, the United States agrees to deliver at the agency house on the reservation herein provided for, on the first day of September of each year, for thirty years, the following articles, to wit:

For each male person over fourteen years of age, a suit of good substantial woollen clothing, consisting of coat, hat, pantaloons, flannel shirt, and a pair of woollen socks; for each female over twelve years of age, a flannel skirt, or the goods necessary to make it, a pair of woollen hose, twelve yards of calico, and twelve yards of cotton domestics.

For the boys and girls under the ages named, such flannel and cotton goods as may be needed to make each a suit as aforesaid, together with a pair of woollen hose for each.

And in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based; and in addition to the clothing herein named, the sum of ten dollars shall be annually appropriated for each Indian roaming and twenty dollars for each Indian engaged

in agriculture, for a period of ten years, to be used by the Secretary of the Interior in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper. And if at any time within the ten years it shall appear that the amount of money needed for clothing under this article can be appropriated to better uses for the tribes herein named, Congress may by law change the appropriation to other purposes; but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named. And the President shall annually detail an officer of the army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery.

ARTICLE X. The United States hereby agrees to furnish annually to the Indians the physician, teachers, carpenter, miller, engineer, farmer, and blacksmith, as herein contemplated, and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior, as will be sufficient to employ such persons.

ARTICLE XI. No treaty for the cession of any portion of the reservations herein described which may be held in common shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive without his consent any individual member of the tribe of his right to any tract of land selected by him, as provided in Article VI, of this treaty.

ARTICLE XII. It is agreed that the sum of five hundred dollars annually, for three years from the date when they commence to cultivate a farm, shall be expended in presents to the ten persons of said tribe, who, in the

judgment of the agent, may grow the most valuable crops for the respective year.

ARTICLE XIII. It is further agreed that until such time as the agency buildings are established on the Shoshonee reservation, their agent shall reside at Fort Bridger, U. T., and their annuities shall be delivered to them at the same place in June of each year.

N. G. TAYLOR, [SEAL.]
W. T. SHERMAN, [SEAL.]
Lt. Genl.
WM. S. HARNEY, [SEAL.]
JOHN B. SANBORN, [SEAL.]
S. F. TAPPAN, [SEAL.]
C. C. AUGUR, [SEAL.]
Bvt. Major Genl. U. S. A., Commissioners.

ALFRED H. TERRY, [SEAL.]
Brig. Gen. and Bvt. M. Gen. U. S. A.

Attest:

A.S.H. WHITE, *Secretary.*

Shoshonees:

WASH-A-KIE.	his + mark.
WAU-NY-PITZ.	his + mark.
TOOP-SE-PO-WOT.	his + mark.
NAR-KOK.	his + mark.
TABOONSHE-YA.	his + mark.
BAZEEL.	his + mark.
PAN-TO-SHE-GA.	his + mark.
NINNY-BITSE.	his + mark.

Bannacks:

TAGGEE.	his + mark.
TAY-TO-BA.	his + mark.
WE-RAT-ZE-WON-A-GEN.	his + mark.
COO-SHA-GAN.	his + mark.
PAN-SOOK-A-MOTSE.	his + mark.
A-WITE-ETSE.	his + mark.

Witnesses:

HENRY A. MORROW,
Lt. Col. 36th Infantry and Bvt. Col. U. S. A.,
Comdg. Ft. Bridger.
LUTHER MANPA, *U. S. Indian Agent.*
W. A. CARTER.
J. VAN ALLEN CARTER, *Interpreter.*

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the sixteenth day of February, one thousand eight hundred and sixty-nine, advise and consent to the ratification of the same, by a resolution in the words and figures following, to wit:

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,
February 16, 1869.

Resolved, (two thirds of the senators present concurring,) That the Senate advise and consent to the ratification of the treaty between the United States and the Shoshonee (eastern band) and Bannack tribes of Indians, made and concluded at Fort Bridger, Utah Territory, on the third July, 1868.

Attest: GEO. C. GORHAM,
Secretary.

Now, therefore, be it known that I, ANDREW JOHNSON, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in its resolution of the sixteenth of February, one thousand eight hundred and sixty-nine, accept, ratify, and confirm the said treaty.

In testimony whereof I have hereto signed my name, and caused the seal of the United States to be affixed.

Done at the city of Washington, this twenty-fourth day of February, in the year of our Lord one
[SEAL.] thousand eight hundred and sixty-nine, and of the Independence of the United States of America the ninety-third.

ANDREW JOHNSON.

By the President:

WILLIAM H. SEWARD,
Secretary of State.

APPENDIX BB

Act of July 27, 1939, 53 Stat. 1128 (1939)

AN ACT

To provide for the distribution of the judgment fund of the Shoshone Tribe of the Wind River Reservation in Wyoming, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed, with the advice and consent of the business council of the Shoshone Tribe of the Wind River Reservation in Wyoming, to prepare a roll showing the members of said tribe living on the date of the approval of this Act, and such roll shall form the basis for the distribution of the judgment fund of said tribe created as the result of the passage of the Act of June 25, 1938 (52 Stat. 1114-1156), and accrued interest thereon.

SEC. 2. That there shall be credited on the books of the Office of Indian Affairs the sum of $2,450 to each member of said tribe whose name appears on the roll provided for in section 1 hereof; and out of such sum so credited the Secretary of the Interior is hereby authorized to make available immediately to each individual member of the tribe the sum of $100; and, under such rules and regulations as he may prescribe, the sum of $1,350 to each adult and the sum of $500 to each minor for the following purposes: Purchase of land, improvement of lands to be acquired or already held by the Indian, for the erection and improvement of suitable homes, the purchase of building material, farming equipment, livestock, feed, food, seed, grain, tools, machinery, implements, household goods, bedding, clothing, and any other equipment or supplies necessary to enable the Indians to fit themselves for or to engage in farming, livestock, in-

dustry, or such other pursuits or vocations, including education, as will enable them to become self-supporting: *Provided, however*, That the funds of the aged, infirm, decrepit, and incapacitated members may be used for their proper maintenance and support in the discretion of the Secretary of the Interior. The remainder of the share of each adult individual Indian, including accrued interest, shall be made available under such rules and regulations as the Secretary of the Interior may prescribe, and the remainder of the share of each minor Indian shall, with accrued interest, be held intact until such Indian reaches the age of eighteen years, when it shall be available under the same conditions as herein provided for adults. As herein used the term "adult" shall include the members of the tribe eighteen years of age or over, and the term "minor" shall include all members less than eighteen years of age. On the death of any enrolled member, adult or minor, the sum on deposit to his credit shall be available for expenditure for the benefit of his heirs for the purposes herein authorized.

SEC. 3. (a) Not to exceed $1,000,000 of said judgment fund, or interest thereon, shall be available for expenditure upon the request of the tribe and with the approval of the Secretary of the Interior, for the purchase of lands in the manner prescribed in section 6 of this Act.

(b) The sum of $125,000 of said judgment fund, or interest thereon, shall, at the request of the tribe and with the approval of the Secretary of the Interior, be set aside as a loan fund for making loans to individual members, or groups of members, of said tribe under such rules and regulations as may be prescribed by the Secretary of the Interior.

(c) The remainder of said judgment fund, including interest thereon, after making the segregation provided for in section 2, and after setting aside the respective amounts authorized by this section, shall be available for

appropriation, upon the recommendation of the Secretary of the Interior, and with the consent of the tribe, for purposes of benefit to the tribe, including the establishment and administration of productive enterprises for the benefit of said tribe, and any income derived from such enterprises shall be credited to the Shoshone tribal judgment fund: *Provided*, That should such enterprises also benefit the Aparaho Tribe repayment proportionate to the benefit to the Arapaho Tribe shall be made into the Shoshone judgment fund by the Arapaho Tribe out of such tribal income as the Arapaho Tribe may enjoy.

SEC. 4. That the Secretary of the Interior be, and he is hereby, authorized and directed to establish land-use districts within the diminished and ceded portions of the Wind River Indian Reservation, Wyoming, and, under such rules and regulations as he may prescribe, to effect the consolidation of Indian and privately owned lands within said districts through exchange, relinquishment, donation, assignment, or purchase of lands or interests therein, including water rights or surface rights to lands, improvements thereon and improvements on undisposed-of ceded lands, to the end that the respective Indian and non-Indian land holdings may be consolidated for more beneficial use. Exchanges of lands hereunder shall be made on the basis of equal value, and the value of improvements on lands to be relinquished to the Indians or by Indians to non-Indians shall be given due consideration, and allowance made therefor in the valuation of lieu lands. This section shall apply to tribal land, and trust or otherwise restricted Indian allotments, whether the allottees be living or deceased. In all transactions involving tribal Indian land, the consent of the Shoshone and Arapaho Tribes shall first be obtained. Title to all lands or interests therein acquired by the Government through exchange of tribal land shall be taken in the name of the United States in trust for the Shoshone and Arapaho Tribes of Indians of the Wind River Reserva-

tion, Wyoming. Title to lands exchanged for individual Indian allotments, or purchased for individual Indians with restricted funds shall be taken by the United States in trust for the individual Indian allottee or heir. The right herein granted individual Indians to acquire lands by purchase with restricted funds or by exchange shall not extend to lands on the ceded or opened portion of the reservation.

SEC. 5. That the Secretary of the Interior is hereby directed to restore to tribal ownership all undisposed-of surplus or ceded lands within the land use districts which are not at present under lease or permit to non-Indians; and, further, to restore to tribal ownership the balance of said lands progressively as and when the non-Indian owned lands within a given land use district are acquired by the Government for Indian use pursuant to the provisions of this Act. All such restorations shall be subject to valid existing rights and claims; *Provided*, That no restoration to tribal ownership shall be made of any lands within any reclamation project heretofore authorized within the diminished or ceded portions of the reservation.

SEC. 6. That the sum of $1,000,000 authorized in section 3 for use in carrying out the land purchase and consolidation program hereinbefore authorized shall remain available until expended and any amount expended shall be reimbursed with interest at 4 per centum per annum to the Shoshone Tribe of Indians of the Wind River Reservation from joint funds to the credit of the Shoshone and Arapaho Tribes of the Wind River Reservation or from future accruals to said joint fund, as and when said funds accrue. Title to all land purchases made hereunder shall be taken in the name of the United States in trust for the Shoshone and Arapaho Tribes of Indians of the Wind River Reservation, Wyoming. All purchases of lands or interests therein made pursuant to this section

shall receive the approval of the Shoshone and Arapaho Tribal Councils or of the business committees thereof.

SEC. 7. That in no event shall any portion of the Shoshone judgment fund become liable, payable, or subject to any debt or debts contracted prior to the passage of this Act by any Indian of the Shoshone Tribe except debts to the United States or to the tribe.

Approved, July 27, 1939.

No. 88-309 and 88-553

Supreme Court, U.S.
FILED
NOV 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE STATE OF WYOMING

Petitioner,

v.

UNITED STATES OF AMERICA,
SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE
OF THE WIND RIVER INDIAN RESERVATION, *et al.*

Respondents.

CITY OF RIVERTON, WYOMING, *et al.*,

Cross-Petitioners,

v.

UNITED STATES OF AMERICA,
SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE
OF THE WIND RIVER INDIAN RESERVATION, *et al.*

Cross-Respondents.

On Petition and Cross-Petition for a Writ of Certiorari to the Supreme Court of Wyoming

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BRIEF IN OPPOSITION FOR RESPONDENTS AND CROSS-RESPONDENTS SHOSHONE AND NORTHERN ARAPAHO TRIBES

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November 21, 1988

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QUESTIONS PRESENTED

In this case, which involves the water rights of the Shoshone and Northern Arapaho Tribes (the "Tribes") of the Wind River Indian Reservation (the "Reservation"), the Supreme Court of Wyoming ruled unanimously that water rights were impliedly reserved for the Tribes under the Second Treaty of Fort Bridger (the "Treaty"), 15 Stat. 673, pursuant to which the Reservation was established in 1868. The Wyoming Supreme Court also ruled unanimously that the proper measure of the amount of water reserved for the agricultural purposes of the Reservation was the 'practicably irrigable acreage" standard adopted by this Court in *Arizona v. California*, 373 U.S. 546, 595-601 (1963).

The questions presented by the petition in No. 88-309 are:

1. Whether the Court should review the rulings below that, in accordance with *Winters v. United States*, 207 U.S. 564 (1908) and its progeny, water rights were impliedly reserved under the Treaty, and that those rights were not abrogated or superseded by a 1905 statute that earmarked certain funds—a portion of the Indians' own proceeds from land sales under the statute—for the purpose of "securing" their water rights from challenge by the State of Wyoming.

2. Whether the Court should review the ruling below that applied the practicably irrigable acreage standard, a standard described by this Court in *Arizona v. California*, 373 U.S. at 601, as "the only

feasible and fair way" to quantify Indian reserved water rights for agricultural purposes.

3. Whether the Court should review the ruling below that assigned a priority date of 1868—the date of the Treaty—to the water rights reserved under the Treaty.

The questions presented by the cross-petition in No. 88-553 are:

1. Whether the Court should review the ruling below that rejected the proposed water-storage requirements and other preconditions on the exercise of the Tribes' reserved water rights under the Treaty, a ruling that expressly considered and is fully consistent with this Court's decision in *United States v. New Mexico*, 438 U.S. 696 (1978).

2. Whether the Court should review the ruling below that applied an economic discount rate fully supported by the evidence, a ruling that is not in conflict with any other decision.

3. Whether the Court should review the ruling below regarding the proper priority date to be assigned to reserved water rights associated with land within the Reservation that is now owned by non-Indians.

4. Whether the Court should review the ruling below that rejected the insubstantial claim that the United States should be estopped from asserting reserved water rights on behalf of the Tribes in this proceeding.

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BRIEF IN OPPOSITION FOR RESPONDENTS AND CROSS-RESPONDENTS SHOSHONE AND NORTHERN ARAPAHO TRIBES

Respondents and Cross-Respondents the Shoshone and Northern Arapaho Tribes of the Wind River Indian Reservation in Wyoming respectfully request that this Court deny the Petition for a Writ of Certiorari of the State of Wyoming in No. 88-309 and the Cross-Petition for a Writ of Certiorari of the City of Riverton, Wyoming, *et al.* ("Riverton"), in No. 88-553. This brief is submitted in opposition to both the petition and the cross-petition in accordance with Justice White's Order of November 16, 1988.

STATEMENT OF THE CASE

This case concerns the reserved water rights of the Shoshone and Northern Arapaho Indian Tribes under the Second Treaty of Fort Bridger, Act of July 3, 1868, 15 Stat. 673, pursuant to which the United States set apart the Wind River Indian Reservation as a permanent homeland—originally for the Shoshone Tribe and, later, for both the Shoshone and the Northern Arapaho Tribes (the "Tribes").

History of the Wind River Indian Reservation

In 1868, the United States and the Shoshone Tribe, which were military allies and had long maintained friendly relations, entered into the Second Treaty of Fort Bridger (the "Treaty"). 15 Stat. 673; Petitioner's Appendix ("Pet. App.") at 9a, 793a. Under its terms, the United States "set apart" a tract of land—approximately 3,054,182 acres—in what was later to become the State of Wyoming "for the absolute and undisturbed use and occupation of the Shoshonee Indians." Treaty at art. 2. In return, the Shoshone Tribe agreed to make this reservation, now known as the Wind River Indian Reservation (the "Reservation"), its "permanent home." *Id.* at art. 4. The Tribe

further agreed to "relinquish all title, claims, or rights" to a vast tract of 44,672,000 acres of land in what are now the States of Wyoming, Colorado, and Utah that had been recognized as "Shoshonee country" under a prior treaty, known as the First Treaty of Fort Bridger, 18 Stat. 685 (Part 3) (1863). Treaty at art. 2; Pet. App. at 9a.

The Shoshones had been a nomadic people dependent upon hunting and fishing for their subsistence. Pet. App. at 9a, 617a-18a, 686a. Accordingly, they faced an enormous transition in converting from their traditional ways to life on the Reservation.

One of the purposes of the Treaty was to assist the Shoshones in making this transition by "help[ing] to create an independent permanent farming community upon the reservation." *United States v. Shoshone Tribe*, 304 U.S. 111, 118 (1938). In various provisions of the Treaty, the United States agreed to assist and encourage the Tribe in the agricultural development of the Reservation. Treaty at arts. 3, 6-10, 12.

The United States also permitted the Shoshones, whose "loyalty . . . to the people of the United States has been conspicuous and unfaltering," *Shoshone Tribe v. United States*, 299 U.S. 476, 486 (1937), to select the lands that were to comprise the Reservation. Petition ("Pet.") at 4. The Shoshones selected lands that were ideally suited for agricultural development. As a result of the abundant runoff from the Wind River Mountains, the selected lands, though located in a semi-arid region, were "the choicest and best-watered portion of Wyoming" and included "fertile river valleys conveniently irrigable." *United States v. Shoshone Tribe*, 304 U.S. at 114. The United States reserved these lands by Treaty for the permanent homeland of the Shoshones before the Territory of Wyoming was created and more than twenty-one years before Wyoming was admitted into the Union in 1890.

Although originally set apart for only the Shoshone Tribe, the Reservation has since become the permanent homeland of both the Shoshone and Northern Arapaho Tribes. The two Tribes have jointly occupied the Reservation since 1878. Pet. App. at 9a-10a.

In 1872 and 1896, the Tribes agreed to cede back to the United States certain portions of the original Reservation in return for fixed cash payments.[1] The 1896 cession had been sought by the Tribes as a means of raising desperately needed cash. *Id.* at 10a. The transition to Reservation life proved to be slow and difficult, and, notwithstanding the ample water and fertile lands on the Reservation, the early attempts of the Indians to develop an agricultural economy had failed. *Id.* Indeed, by 1895 the Tribes had become totally dependent on the United States for food, clothing and shelter. *Id.*

In 1904 the Tribes, still experiencing substantial problems in developing an agricultural economy, entered into an agreement with the United States, later ratified by Congress in the Act of March 3, 1905 (the "1905 Act"). 33 Stat. 1016; Pet. App. at 769a. Under the 1905 Act, the United States was authorized to act as trustee for the Tribes in opening for non-Indian settlement approximately 1,480,000 acres of the Reservation, essentially its northern two-thirds. The 1905 Act, unlike the earlier cessions, did not involve an outright sale of Reservation lands in return for a fixed cash payment. Rather, the United States agreed to act only "as trustee for said Indians to dispose of said lands," and obligated itself to pay the Tribes "the proceeds received from the sale [of the opened lands] only as [those payments were] received [by the Government]." 1905 Act at art. 9; Pet. App. at 774a.

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[1] Brunot Agreement, 18 Stat. 291 (Shoshone Tribe ceding 700,642 acres for $27,500); First McLaughlin Agreement, 30 Stat. 62, 93-95 (Shoshone and Northern Arapaho Tribes ceding 55,000 acres "and the water rights appertaining thereunto" for $60,000).

The opening for settlement of the northern portion of the Reservation, though much heralded, proved to be a dismal failure. The congressman who sponsored the 1905 Act had predicted that land sales would generate $1.8 million, but by 1914 only 128,986 acres—less than 10 per cent of the opened portion of the Reservation—had been sold for little more than $250,000. Pet. App. at 412a. In 1915, as a result of the minimal demand for these lands, the Secretary of the Interior temporarily discontinued further sales of the opened lands, and, from 1915 through 1934, only a few tracts involving a small number of acres were sold. *Id.* at 412a-13a. In 1934, the Secretary again discontinued such sales. Thereafter, the trust arrangement pursuant to which the opened lands were offered for sale by the United States was formally terminated. *Id.* at 413a. Most of the opened lands are still owned by the Tribes.

The Shoshones and Northern Arapahos are now engaged in irrigated farming on substantial portions of the Reservation, *id.* at 463a-531a, but there remain large unfarmed tracts of irrigable Reservation land. *Id.* at 532a-80a; 229a-30a.

History of the Adjudication

The State of Wyoming initiated this adjudication of the Tribes' reserved water rights under the Treaty more than a decade ago in Wyoming's own state courts in connection with a general adjudication of water rights in the Big Horn River Basin. Wyoming obtained jurisdiction to adjudicate the water rights of the Tribes by joining the United States in the state-court proceeding pursuant to a jurisdictional statute enacted by the State Legislature only two days before the proceeding was filed. Wyo. Stat. § 1-37-106 (1977); Pet. App. at 726a. This statute was designed to permit the State to litigate this proceeding in state, rather than federal, court.[2]

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[2] The statute—which Wyoming has used only in connection with this proceeding—was specifically tailored to meet the requirements of the

The United States and the Tribes sought to defeat the State's choice of forum, but these efforts were strenuously and successfully opposed by the State.[3] Thereafter, the Tribes intervened in the state proceeding to protect their water rights under the Treaty.

In May 1979, the state district court appointed a Special Master approved by all the parties to conduct the adjudication.[4] The Special Master divided the proceeding into three phases. The first phase—the only one at issue here—was a determination of Indian reserved water rights.

On December 15, 1982, following several years of extensive pretrial discovery as well as conferences and hearings involving "more than 100 attorneys, transcripts of more than 15,000 pages and over 2,300 exhibits," Pet. App. at 14a, the Special Master signed his 451-page Report and proposed Decree regarding the water rights reserved for the Tribes under the Treaty. *Id.* at 367a.

The Rulings Below

The Special Master flatly rejected the State's argument that water rights were not reserved under the Treaty. Relying upon *Winters v. United States*, 207 U.S. 564 (1908)

McCarran Amendment, 43 U.S.C. § 666, as elaborated by this Court in Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976), for waiver of sovereign immunity by the United States in state water adjudications. Pet. App. at 389a-93a.

[3] When the United States petitioned to remove the proceeding to federal district court, the State persuaded that court to remand the proceeding to state court in light of the McCarran Amendment and this Court's decision in *Colorado River*. Pet. App. at 720a-723a; *see supra* note 2. After remand to the state court, Wyoming successfully opposed a motion by the United States, which the Tribes had supported, to dismiss the state proceeding on the ground that the state court lacked jurisdiction to resolve the reserved water rights of the Tribes and the United States. *Id.* at 11a-12a.

[4] The Special Master, the Honorable Teno Roncalio, had previously served as a Member of the United States House of Representatives from Wyoming.

("*Winters*"), and its progeny—in which this Court has consistently held that, when Indian reservations were established, water rights were impliedly reserved to satisfy the purposes of the reservations—the Special Master ruled that "Congress, by the Treaty of 1868, impliedly created a reservation for water on the Wind River Indian Reservation to satisfy the purposes of that Treaty." Pet. App. at 432a. With respect to the Treaty's purpose of promoting agriculture, the Special Master ruled that the proper measure of the amount of water reserved under the Treaty was that necessary to irrigate all the "practicably irrigable acres" on the Reservation (the "PIA standard"). *Id.* at 532a. The Special Master then quantified that amount in a painstaking analysis of the massive evidentiary record. *Id.* at 446a-580a. In applying the PIA standard, the Special Master noted that he was following this Court's ruling in *Arizona v. California*, 373 U.S. 546, 601 (1963), that "the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage." Pet. App. at 532a.

The Special Master further held that the purpose of the Treaty was to permit the Indians to develop a "permanent homeland" on the Reservation, a purpose broader than simply developing an agricultural economy. *Id.* at 441a-42a. Accordingly, he ruled that the total amount of water reserved under the Treaty included not only that quantified under the PIA standard, but also that necessary for certain non-agricultural uses, including mineral development, municipal uses, and fisheries. *Id.*

The district court affirmed the Special Master's ruling that water rights were reserved under the Treaty, rejecting the State's argument as contrary not only to "this Court's interpretation of what the intent of Congress was but also . . . to the controlling case law on the subject." *Id.* at 211a. The district court also affirmed the Special Master's use of the PIA standard. *Id.* at 228a-29a. But the district court rejected the Special Master's ruling that

the purpose of the Reservation was to create a permanent homeland for the Indians, holding instead that the purpose was "to convert the Indians from a nomadic to an agrarian people." *Id.* at 219a. Having concluded that "the sole purpose of the Reservation was agriculture," *id.* at 220a, the court reduced the total amount of water quantified by the Special Master to only that determined by the PIA standard. *Id.* at 221a.

The Supreme Court of Wyoming, affirming the rulings of the Special Master and the district court, held that there was "an intent to reserve water" under the Treaty, *id.* at 26a, and that it was "correct [to] quantify[] the Tribes' reserved water right by the amount of water necessary to irrigate all of the reservation's practicably irrigable acreage." *Id.* at 47a. Contrary to the ruling of the Special Master, the Supreme Court of Wyoming, by a vote of three to two, affirmed the district court's ruling regarding the purpose of the Reservation, holding that "the intent at the time [of the Treaty was] to create a reservation with a sole agricultural purpose." *Id.* at 38a. In light of this conclusion, the state supreme court majority affirmed the reduction of the amount of water reserved for the Tribes to only that quantified under the PIA standard.

REASONS FOR DENYING THE WRIT

The State of Wyoming initiated this adjudication involving the federal treaty rights of the Tribes over a decade ago in Wyoming's own state courts pursuant to a specially enacted jurisdictional statute, and vigorously resisted the efforts of the United States and the Tribes to defeat the State's choice of forum. The State ultimately won the right to litigate the dispute in its own courts.

Wyoming then attempted to exploit its home-court advantage by challenging even the most basic rights of the Tribes under the Treaty. First, even though reserved water rights under the Treaty had been recognized judicially as

early as 1926, the State sought to revisit the issue, urging the Wyoming courts to rule that there are no such rights under the Treaty. Second, notwithstanding this Court's definitive ruling on the PIA standard in *Arizona v. California*, 373 U.S. 546, 600-01 (1963) ("*Arizona I*"), the State argued that, if there are reserved water rights under the Treaty, the PIA standard is too generous a measure of those rights.

The Wyoming courts rejected both of the State's arguments, concluding that they were contrary to controlling precedents of this Court and to prior case law specifically recognizing reserved water rights under the Treaty. Indeed, the State lost these issues at *every* level of its own state court system.

Neither of these issues—nor for that matter any of the litany of other issues raised by Wyoming and Riverton—warrants review. In ruling that the Treaty created reserved water rights, the Wyoming courts properly held that this case was controlled by *Winters* and its progeny. The State's principal argument below—and again here—is that the so-called "water proviso" to the 1905 Act somehow effected a taking of the Tribes' vested property by terminating their reserved water rights under the 1868 Treaty. But, as the Wyoming courts correctly ruled, the water proviso, which simply governed how a portion of the Indians' own proceeds from 1905 Act land sales were to be spent, falls far short of that necessary to meet this Court's strict standards for finding an abrogation of Indian treaty rights. In any event, review is not warranted because the issue—which turns on the unique statutory language, legislative history and contemporaneous administrative interpretation of the water proviso—has no general applicability.

With respect to the PIA standard, the Wyoming courts correctly followed *Arizona I*, 373 U.S. at 595-601, where

this Court, after considering several other proposed standards for quantifying reserved water rights for agricultural purposes on Indian reservations, ruled that PIA—"enough water . . . to irrigate all the practicably irrigable acreage"—was "the *only* feasible and fair way by which reserved water for the reservations can be measured." *Id.* at 600, 601 (emphasis added). The alleged conflicts among the lower courts on the PIA standard simply do not exist. Moreover, as the Wyoming courts correctly recognized, the PIA standard—a standard for quantifying the reserved water rights for Indian reservations for agricultural purposes—is fully consistent with this Court's decisions after *Arizona I* quantifying reserved water rights for federal enclaves created for non-agricultural purposes.

The State's effort here to modify the PIA standard would call into question twenty-five years of litigation and settlements throughout the West that have been based on this Court's ruling in *Arizona I* that PIA is "the only feasible and fair way" to quantify Indian reserved water rights for agricultural purposes. This Court has repeatedly admonished Indian tribes for failing to respect "the compelling need for certainty" in Western water-rights adjudications. *Arizona v. California*, 460 U.S. 605, 620 (1983) ("*Arizona II*"); *Nevada v. United States*, 463 U.S. 110, 129 n.10 (1983). These concerns apply with equal force to the State's arguments here. Thus review should be denied.

I. Wyoming and Riverton Are Wrong in Contending that They Have Suffered an Injustice at the Hands of Their Own State Courts.

Wyoming and Riverton labor mightily to create the impression that they have been forced to bear a series of inequities inflicted by their own state courts. This suggestion is sufficiently implausible that perhaps no response is needed. Nevertheless, in light of the fact that Wyoming and Riverton devote so much space to this proposition,

the following points are in order before turning to the specific questions presented.

First, contrary to the suggestion of Wyoming and Riverton that their arguments were not given due consideration below, the legal arguments advanced by Wyoming and Riverton were carefully considered by the Wyoming courts in decisions that span over 700 pages of the Petitioner's Appendix in No. 88-309. The Wyoming courts also painstakingly analyzed the testimony and documentary evidence submitted by all parties, including Wyoming and Riverton, and entered extensive findings of fact. Pet. App. at 635a-90a, 243a-62a, 169a. Rather than relying here on those findings of fact, Wyoming and Riverton instead cite repeatedly to their own trial exhibits, *e.g.*, Pet. at 4-7, 13 n.12; Cross-Petition in No. 88-553 ("Cross-Pet.") at 3-5, 6 n.5, making the same arguments here that were considered and consistently rejected by the Wyoming courts.

Second, contrary to the impression that Wyoming and Riverton seek to create that the rulings below were adverse only to them, the Wyoming courts ruled against the Tribes and the United States on a number of significant issues, several of which are set forth in the Tribes' conditional cross-petition in No. 88-492. Indeed, the Wyoming courts ruled for the Tribes only on the most well settled of Indian water rights, namely, water rights reserved for agricultural purposes quantified under the PIA standard. Moreover, in applying the PIA standard, the Wyoming courts rejected some 50,000 of the approximately 150,000 acres that the Tribes and United States had originally proposed as practicably irrigable acreage. Pet. App. at 72a.

Third, Riverton is simply wrong in asserting that "application of the reserved right doctrine *at this late date* on the Reservation applies *a new rule* . . . for the establishment of water rights on the Reservation." Cross-Pet. at 28-29 (emphasis added). The United States began formally to assert reserved water rights on behalf of the

Tribes after this Court's *Winters* ruling in 1908, Pet. App. at 30a, and by 1916, the federal district court in Wyoming had enjoined the State Water Commissioner from interfering with the water rights of individual Indians on the Reservation.[5] Indeed, by 1926, the federal district court had specifically recognized the existence of reserved water rights under the 1868 Treaty, *United States v. Parkins*, 18 F.2d 642, 643 (D.Wyo. 1926),[6] a ruling that Wyoming and Riverton neglect to mention to this Court. In short, Wyoming and Riverton—not the Tribes or the United States—are seeking to rewrite history in this proceeding,

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[5] United States v. Hampleman, No. 742 (U.S.D.C. Wyo. June 25, 1916) (ruling that the water rights of the Indians "are within the absolute and exclusive jurisdiction" of the United States) (unpublished order reproduced herein as Exhibit A).

[6] In *Parkins*, the federal district court held that the 1868 Treaty "like all other treaties with the Indians creating reservations, contemplates the use and benefit of the lands within the reservation to its wards, the Indians, which likewise includes the irrigation of those lands, they being arid in character." 18 F.2d at 643 (citing Winters v. United States, 207 U.S. 564 (1908)).

Similarly, in Merrill v. Bishop, 287 P.2d 620 (Wyo. 1955), which involved a dispute over the water rights of non-Indians who had acquired allotted lands on the Reservation, the Supreme Court of Wyoming acknowledged that:

> It must, of course, be admitted that according to the holding in Winters v. United States, . . . , the water rights appurtenant to the Indian Reservation here in question were reserved to the Indians by the treaty of 1868.

Id. at 623 (citation omitted). The *Merrill* court then raised but did not decide the question whether the rights reserved under the Treaty had later been abrogated by Congress when it admitted Wyoming into the Union. *Id.* at 623-26. This Court had rejected this type of abrogation argument before *Merrill*, *see* Winters, 207 U.S. at 597-98, and has done so consistently since *Merrill*, *see* United States v. District Court In and For the County of Eagle, 401 U.S. 520, 522-23 (1971); Arizona I, 373 U.S. 596-98. Accordingly, the Wyoming courts correctly rejected the argument in this proceeding, Pet. App. at 26a-28a, 31a-32a, and the State has not sought review of this question.

for reserved water rights under the Treaty have been judicially recognized for over sixty years.

Fourth, Riverton is wrong in asserting that this case gives rise to the concern expressed in *United States v. New Mexico*, 438 U.S. 696, 705 (1978), that reserved water rights may "require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators." Because of the abundant run-off from the Wind River Mountains, the Reservation is "the best-watered portion of Wyoming." *United States v. Shoshone Tribe*, 304 U.S. at 114. Accordingly, when the Bureau of Indian Affairs honored the Tribes' reserved rights on the Reservation during the drought of this past summer, it resulted in virtually no water loss to non-Indian irrigators.[7]

Riverton is simply misrepresenting the record in asserting that "[t]his is a case in which the findings below demonstrate that there will be a gallon for gallon reduction in water available to state and private water users as a result of the quantification of a Federal reserved water right." Cross-Pet. at 18. There was never any such finding in this proceeding, and the Supreme Court of Wyoming expressly held that there is "no indication" that the use by the Tribes of their reserved water would cause a "gallon for gallon reduction in the water available for other uses." Pet. App. at 71a. Moreover, the state district court

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[7] As Riverton notes, there was a dispute this past summer regarding a water shortage on one irrigation project on the Reservation. Cross-Pet. at 8 n.9. What Riverton fails to note, however, is that the Tribes and the State, working together under an agreement signed by the Governor and the Chairmen of the Business Councils of the Tribes, determined that the shortage in question was "*not* the result of an actual shortage of water supply, but rather [was] the result of problems with management of the water supply and of the need for structural improvement in the irrigation and delivery system." Agreement at 1 (emphasis added) (reproduced as Exhibit B, page 3a *infra*). The dispute was then settled to the satisfaction of the Tribes and the State after certain water management changes were implemented to ensure that all water users would receive their full legal entitlement.

specifically deleted its only finding that the quantification would have *any* adverse effect on other water users.[8]

Fifth, in their repeated assertions that the Wyoming courts quantified an excessive amount of water in light of the current irrigation needs of the Tribes, Wyoming and Riverton miss the whole point of Indian reserved water rights. The essence of such rights is that they "vest[]" and become "effective" when an Indian reservation is created in an amount necessary "to satisfy the *future* as well as the present needs" of the reservation. *Arizona I*, 373 U.S. at 600 (emphasis added). In so defining these rights, this Court correctly recognized that Indian reservations throughout the West would be largely worthless if the Indians were left to compete with non-Indians for water under the state-law doctrine of prior appropriation.[9] There are compelling historical reasons why the Indians would invariably have lost the race to the stream under the doc-

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[8] Riverton's assertion regarding a "gallon-for-gallon reduction" is apparently based on the district court's original Finding of Fact Number 98, Pet. App. at 258a, but, as even Riverton must acknowledge, Cross-Pet. at 14-15 n.17, the district court later deleted that finding. Pet. App. at 169a. In any event, the original Finding of Fact Number 98 simply stated that "the construction of any one or all of the [Tribes'] future [irrigation] projects would have *an adverse effect* on other water users," *id.* at 258a (emphasis added), not that the use of water for these projects would result in a "gallon-for-gallon reduction" for other water users.

Similarly, the Special Master did not find that there would be a "gallon-for-gallon reduction." He simply found that full use by the Tribes of their reserved water rights "may have an adverse effect on many appropriators." Pet. App. at 630a. The Special Master did not purport to quantify this effect, *see id.* at 632a-34a, and, in any event, the district court deleted its only finding of adverse effect.

[9] "Under the doctrine of prior appropriation, the first to divert and use water beneficially establishes a right to its continued use as long as the water is beneficially diverted." Cappaert v. United States, 426 U.S. 128, 139-40 n.5 (1976).

trine of prior appropriation,[10] and why, even today, many Indian reservations, such as the Wind River Reservation, have yet to achieve full agricultural development.[11]

Sixth, Wyoming's fanciful assertion here that there has been "full irrigation development" on this Reservation, Pet. at 23-26, is completely without support in the record and is contradicted by the findings of the Wyoming courts that there are large unfarmed tracts of practicably irrigable acreage on the Reservation. Pet. App. at 532a-580a; 229a-230a.

Finally, the equitable arguments advanced here by Wyoming and Riverton not only are overblown,[12] but also are

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[10] "The Indians were not an agricultural people and it was necessary for them to develop their agricultural skills after settling on the Reservations. . . . [I]f they were thrown into competition with the more advanced non-Indians in a race to acquire rights to water by putting it to beneficial use, they would have lost the match before it was begun." Report of Simon H. Rifkind, Special Master, *Arizona v. California*, No. 8 Original, at 261 (Dec. 5, 1960). Indeed, as the Wyoming courts noted, the first few decades of agricultural development on the Wind River Reservation, notwithstanding its ample waters and fertile lands, were a complete failure, causing the Indians to have to sell a portion of their land to raise cash to support themselves. Pet. App. at 10a.

[11] Indian farmers were hampered in their later efforts to catch up in the race to the stream by the fact that "[i]rrigation systems and other water resource projects often require substantial investments, and Congress has tended to give a higher priority to projects that benefit non-Indians." F. Cohen, Handbook of Federal Indian Law 598 (1982). This has certainly been true on the Wind River Reservation, as illustrated by the Riverton Reclamation Project. As a result of these funding disparities, many Indian reservations, including Wind River, have not as yet achieved full agricultural development.

[12] As previously noted, reserved water rights under the 1868 Treaty have been judicially recognized for over sixty years, and the state district court specifically deleted its only finding that the quantification of the Tribes' water rights in this proceeding would have *any* adverse

outweighed by those favoring the Tribes. The events culminating in the 1868 Treaty and the terms of the Treaty itself lend compelling support to the conclusion that, at the very least, the Treaty reserved an amount of water sufficient to irrigate the practicably irrigable acreage on the Reservation.[13] *See supra* pages 1-2. Moreover, the United States and the Tribes entered into the 1868 Treaty before Wyoming was even a Territory and more than thirty-five years before the passage of the 1905 Act upon which the equitable arguments of Wyoming and Riverton are based. In addition, the water quantified under the PIA standard is now desperately needed to improve the Reservation economy, where the unemployment rate among Indians exceeds 70 per cent. *See infra* note 37. In short, the equities weigh decidedly in favor of the Tribes.

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effect on other water users.

It should also be noted that the relief sought by the State in its complaint commencing this adjudication was only a quantification of all water rights in this region of Wyoming. As the State received the relief it prayed for, further review at its request is inappropriate. *Cf.* Public Service Comm'n v. Brashear Freight Lines, Inc., 306 U.S. 204, 206 (1939).

[13] As this Court has previously ruled, the terms of this Treaty "are to be construed in the sense in which naturally the Indians would understand them." United States v. Shoshone Tribe, 304 U.S. at 116. In light of the terms of the Treaty and its history, there can be no doubt that when the Shoshones entered into the Treaty, they "naturally . . . would [have] under[stood]" that, at the very least, the Tribe would be permitted to use all the water necessary to accomplish the agricultural objectives of the Reservation.

II. The Questions Presented by Wyoming and Riverton Were Correctly Resolved by the Wyoming Courts and Do Not Warrant Review.

A. Water Rights Were Impliedly Reserved Under the 1868 Treaty, and Those Rights Were Not Abrogated or Superseded by the Water Proviso to the 1905 Act.

1. *Winters* and *Arizona I*

The Wyoming courts correctly held that water rights were impliedly reserved when the Reservation was established pursuant to the 1868 Treaty. Pet. App. at 431a-39a, 210-13a, 26a-32a. As the Wyoming courts recognized, this case is controlled by *Winters* and *Arizona I*. This Court held that, when each of the six Indian reservations at issue in those decisions was established, water was impliedly reserved to satisfy the purposes of the reservation.

In *Winters*, the Court found this intent implicit in the circumstances surrounding the creation of the Fort Belknap Indian Reservation and the 1888 Agreement pursuant to which it was created. As the Court noted, the purpose of the 1888 Agreement was to assist the Indians in "chang[ing] [their] habits" from that of a "nomadic and uncivilized people" to that of "a pastoral and civilized people." 207 U.S. at 576. The Court further noted that a reservation of water was essential to accomplish that purpose because the lands on the Fort Belknap Reservation "were arid and, without irrigation, were practically valueless." *Id.* ~~In those~~ circumstances, and in light of the fact that the Indians had ceded "a very much larger tract" in return for these lands, the Court concluded that water rights had been impliedly reserved for the Indians under the 1888 Agreement. *Id.*

Similarly, in *Arizona I*, this Court, noting that "[m]ost of the land in these [five Indian] reservations is and always has been arid," held that water for agriculture had been

impliedly reserved when the reservations were established, because the United States "intended to deal fairly with the Indians by reserving for them waters without which their lands would have been useless." 373 U.S. at 598, 600. In short, an intent to reserve water "is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created." *Cappaert v. United States*, 426 U.S. 128, 138 (1976) ("*Cappaert*"), citing *Winters* and *Arizona I*.

Winters and *Arizona I* have been cited with approval by this Court in every federal and Indian reserved water rights case since they were decided.[14] Moreover, the lower courts have repeatedly followed *Winters* and *Arizona I* in finding an intent to reserve water on other Indian reservations.[15]

The Wyoming courts correctly held that this case was indistinguishable from *Winters* and *Arizona I*. As was true of the Indian reservations in those cases, one of the purposes of the Wind River Indian Reservation—indeed, according to the Supreme Court of Wyoming, its "sole . . . purpose"—was to encourage the previously nomadic In-

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[14] United States v. District Court In and For the County of Eagle, 401 U.S. 520, 522-23 (1971); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 805 (1976); Cappaert v. United States, 426 U.S. 128, 139 (1976); United States v. New Mexico, 438 U.S. 696, 700 n.4 (1978); Arizona v. California, 460 U.S. 605, 616 (1983); Nevada v. United States, 463 U.S. 110, 116 n.1 (1983); Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 550 n.2 (1983).

[15] *E.g.*, Conrad Investment Co. v. United States, 161 F. 829 (9th Cir. 1908); Skeem v. United States, 273 F. 93 (9th Cir. 1921), United States v. Hibner, 27 F.2d 909, 911 (D. Idaho 1928); United States v. Parkins, 18 F.2d 642, 643 (D. Wyo. 1926); United States v. McIntire, 101 F.2d 650 (9th Cir. 1939); United States v. Powers, 94 F.2d 783, 785 (9th Cir. 1938), *aff'd*, 305 U.S. 527 (1939); and United States v. Ahtanum Irrigation Dist., 236 F.2d 321 (9th Cir. 1956).

dians to develop an agrarian economy.[16] Pet. App. at 38a, 216a-22a. Moreover, as was true of the reservations in *Winters* and *Arizona I*, this agricultural objective simply could not be accomplished on the Reservation without water, for, as the district court specifically found:

> Much of the reservation land was arid. The water was needed for irrigation and was essential to the raising of crops. Without water most of the land would have been useless.

Pet. App. at 211a. In these circumstances, the Wyoming courts correctly held that water rights were impliedly reserved under the 1868 Treaty; indeed, as the Special Master noted, "[a]ny other conclusion would appear to be contrived, and contrary to Supreme Court precedent."[17] Pet. App. at 434a.

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[16] In addition, as was true of the Indians in *Winters*, the Shoshones agreed under the 1868 Treaty to cede their rights to a vast tract of land (44,672,000 acres) in return for a permanent home on a much smaller tract (3,054,182 acres) on which they were to pursue a new way of life. United States v. Shoshone Tribe, 304 U.S. at 113.

The Tribes agree that one of the purposes of the Reservation was to encourage the Indians to develop an agricultural economy, but disagree with the holding of the Supreme Court of Wyoming that the Reservation had a *sole* agricultural purpose. *See* Tribes' Cross-Petition in No. 88-492 at 11-18.

[17] The State asserted below that "[t]he Reservation was in essence a gift to [Shoshone Chief] Washakie for his assistance to the United States in the years preceding 1868" and that the Shoshones were to relocate on the Reservation "to begin a new life as farmers." Brief of Appellee State of Wyoming in Response to the Appellants' Briefs of the United States and Tribes (Type 2 Claims) 64, 65 (Feb. 24, 1986). Thus, in disputing the existence of reserved water rights under the 1868 Treaty, the State is asserting that the Reservation was a "gift" to the Shoshones on which they were to become farmers, but that the gift came without water, even though, as the district court found, "[w]ithout water most of the land would have been useless." Pet. App. at 211a. In *Winters* and *Arizona I*, this Court specifically rejected the same argument, namely, that "Congress had created an Indian Reser-

2. The Water Proviso to the 1905 Act

The State asserts that the "water proviso" to the 1905 Act was a decision by Congress to defer to Wyoming law for the acquisition of all water rights for the Wind River Indian Reservation. Pet. at 12-18. The State's argument here is the culmination of its dogged but meritless effort throughout this proceeding to create, for the Wind River Reservation, an isolated exception to *Winters* and its progeny.

Under the water proviso, a portion of the proceeds to the Indians from the sale of their land under the 1905 Act—if "any balance" remained after other specified payments—was to be "devoted to surveying, platting, making of maps, payment of the fees, and the performance of such acts as are required by the statutes of the State of Wyoming in *securing* water rights from said State." Pet. App. at 772a (emphasis added). The proceeds earmarked by the proviso were then used, as the proviso directed, for the purpose of "securing" the water rights of the Indians from challenge by Wyoming. *Id.* at 30a.

Wyoming raises two arguments based on the water proviso. The State first argues that the existence of reserved water rights under the 1868 Treaty "is contrary to the intent of Congress" in enacting the water proviso to the 1905 Act. Pet. at 12, 13-16. But, as the Special Master noted in a related context, this argument "wholly lacks any chronological perspective." Pet. App. at 437a. The source of the reserved water rights for the Reservation is the 1868 Treaty, and Wyoming's argument "fails to address the question of what was the Congressional intent in 1868, the date of the treaty," *id.*, much less the intent of the Indians at that time. The Wyoming courts thus correctly recognized that the intent of Congress in 1905 is irrelevant to the question presented here, namely,

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vation without intending to reserve waters necessary to make the reservation livable." Arizona I, 373 U.S. at 599; Winters, 207 U.S. at 576.

whether water rights were reserved under the 1868 Treaty ratified by the Senate almost forty years before the 1905 Act.[18]

Moreover, even if the intent of Congress nearly four decades later were somehow relevant, the Wyoming courts correctly ruled that the existence of reserved water rights under the 1868 Treaty "is not inconsistent with the [water proviso to the] pre-Winters 1905 Act." *Id.* at 29a. The purpose of the water proviso was not, as the State urges, to subject the water rights of the Indians to exclusive state jurisdiction. Rather, as the only historian who testified on this point concluded, the proviso was an attempt on the part of the United States "to cover as many bases as it could" to protect the Indians in the face of legal uncertainty regarding their treaty rights prior to this Court's definitive 1908 ruling in *Winters*.[19] Iverson Tr. 543. Under the proviso, a portion of the Indians' own proceeds from land sales under the 1905 Act were earmarked for "securing" their water rights from challenge by Wyoming in the event that the courts might later determine that com-

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[18] One of the most important attributes of Indian reserved water rights is that they "vest[]" and become "effective" when an Indian reservation is created. Arizona I, 373 U.S. at 600. *Accord*, Cappaert, 426 U.S. at 138-40 & n.5. The reserved water rights for the Wind River Reservation are, therefore, property rights that either were or were not established in 1868. By their very nature, the initial existence of these water rights depends upon what took place in 1868, not on what happened in 1905.

[19] The water proviso was a prudent response to two pressing considerations in 1905: (1) the non-Indians who would be entering the Reservation under the 1905 Act would immediately begin the race to the stream under the doctrine of prior appropriation, and (2) this race was to begin when there was necessarily "some uncertainty in the status of Indian water rights" before this Court's 1908 ruling in *Winters*. Pet. App. at 28a. If the courts later determined that there were in fact no reserved water rights under the 1868 Treaty, and the Indians had not "secur[ed]" their water rights from challenge by Wyoming, the Indians would have lost the race before it began.

pliance with state law was required. Accordingly, as the Supreme Court of Wyoming correctly held, the state water rights "secur[ed]" for the Indians with the proceeds earmarked by the proviso were acquired not in lieu of their reserved water rights under the 1868 Treaty, but rather as a pre-*Winters* precaution to safeguard their right to water. Pet. App. at 28a-31a.

This interpretation of the water proviso, as the Wyoming courts recognized, is supported by the express terms,[20] legislative history[21] and contemporaneous admin-

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[20] The State errs in asserting that the water proviso to the 1905 Act "expressly requires the acquisition of [the] reservation's water rights under state law." Pet. at 12. The water proviso did not *require* the acquisition of anything; it simply governed how a portion of the proceeds from the 1905 Act land sales were to be spent if there was "any balance" remaining after other specified payments were made. Indeed, if there had not been "any balance" remaining, the proviso would have had no force whatever. As it happened, there was a remaining balance. But, once those remaining proceeds were spent, the proviso, by its express terms, had served its only purpose and imposed no further requirements on the Tribes or the United States. The water proviso thus falls far short of an express congressional requirement that all water rights for the Reservation be acquired under state law.

The express terms of the proviso reveal that its purpose was to assist the Indians in "securing [their] water rights from said state." The use of the word "securing" in the proviso is consistent with the legislative history and contemporaneous administrative interpretation of the proviso that reveal that it was intended as a pre-*Winters* measure to "secur[e]" or protect the water rights of the Indians from challenge by the State in the event that the courts might later determine that compliance with state law was required.

[21] As the Supreme Court of Wyoming noted, the water proviso was enacted partially in response to concerns of the Indians who, prior to *Winters* and on the eve of opening a large portion of the Reservation to non-Indians under the 1905 Act, were understandably "eager to secure their water rights." Pet. App. at 28a. In response to these concerns, the Government's negotiator, referring to the proceeds that were to be earmarked under the proviso, advised the Indians that "[i]t would be well to use this surplus in securing your water rights so that

istrative interpretation of the proviso.[22] The State submitted 348 so-called "intent and purposes" exhibits in an effort to show "a conscious, deliberate attitude on the part of Congress that if the Indians were to expect any water, they must rely on and comply with the system of appropriation established by state law." Pet. App. at 436a-37a. But the Special Master, in a ruling affirmed by the district court and the Wyoming Supreme Court, concluded that "[w]hile lengthy, bulky, and large in number, the exhibits . . . lack the qualitative content necessary to support the

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the whiteman cannot deprive you of water with which to irrigate your lands." Minutes of Council, Shoshone Agency, Wyoming, April 19, 1904; Plaintiff's Exhibit WRIR-8. Thus, as the Supreme Court of Wyoming held, the Indians "understood that the agreement would make their water rights firm." Pet. App. at 29a. Wyoming seeks to turn the proviso on its head by asserting that this prudence on the part of the Indians in agreeing to earmark a portion of their *own* proceeds from 1905 Act land sales should be construed as a "fulfill[ment]" by Congress of the prior treaty rights of the Indians. Pet. at 15-16.

[22] As the Supreme Court of Wyoming recognized, there was "some uncertainty" on the part of federal officials prior to *Winters* regarding the legal status of reserved rights on the Reservation. Pet. App. at 28a. But the United States began asserting such rights after *Winters*, while initially also continuing to pursue state water rights. *Id.* at 30a. Shortly thereafter, what Wyoming characterizes as the "extensive cooperation between the Indian Service and the Wyoming State Engineer" in the "[d]evelopment of Indian irrigation projects on the Reservation," Pet. at 5, became far less extensive and far less cooperative. In 1910, as the Supreme Court of Wyoming noted, the United States "refused to apply to the State for an extension of time in which to complete the irrigation project authorized by the 1905 Act." Pet. App. at 30a. In 1911, a dispute arose when State "Water Commissioner Hampleman first closed the headgates on an allottee's ditches claiming that [the Shoshone farmer] had no valid state permit." *Id.* As a result of this dispute, the United States filed suit asserting reserved water rights under the 1868 Treaty, and obtained an injunction against the Water Commissioner. United States v. Hampleman, *supra*; Pet. App. at 30a. In 1926, the United States again filed suit asserting reserved water rights under the 1868 Treaty, and the federal district court explicitly recognized the existence of such rights. United States v. Parkins, *supra*.

State's argument." *Id.* at 437a. The Supreme Court of Wyoming specifically held that "[a] reservation of water with an 1868 priority date is not inconsistent with the [state] permit provisions of the pre-Winters 1905 Act."[23] *Id.* at 29a.

The Wyoming courts also correctly rejected Wyoming's second argument based on the proviso—that even if there were reserved water rights under 1868 Treaty, those rights were "terminated by the express language of the water proviso."[24] Pet. at 16-17. The express language of the prov-

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[23] There is no merit to the assertions of Wyoming and Riverton that their state courts "failed to assign any meaning or purpose to the water proviso," "elected to write [it] into oblivion," or improperly relegated it to "the dustbin of history." Pet. at 17, 18; Cross-Pet. at 11. Wyoming and Riverton simply object to the fact that their interpretation of the proviso was rejected by the Wyoming courts.

[24] In arguing that any preexisting treaty rights were terminated, Wyoming also chides the Supreme Court of Wyoming for "fail[ing] even to address the fact that Congress carefully considered and refused to enact a limited reserved water right [on the Reservation in connection with the 1905 Act and a 1914 appropriations act.]" Pet. at 17, 12. But the Wyoming Supreme Court specifically addressed these legislative proposals and concluded that their rejection was "no indication that there was no intent to reserve water." Pet. App. at 31a, 29a. In any event, the fact that Congress did not enact *affirmative* legislation regarding reserved water rights in 1905 or 1914 has no bearing whatsoever on whether Congress intended to *abrogate* a preexisting right under the 1868 Treaty.

The State emphasizes that, in connection with the 1914 proposal, the Assistant Commissioner of Indian Affairs had testified that "the water proviso [to the 1905 Act] had 'practically nullified' Federal reserved water rights under *Winters*." Pet. at 13. The State fails to note, however, that the Assistant Commissioner also testified that he supported the 1914 proposal that would have expressly recognized certain reserved water rights because "otherwise the Indians *stand a chance* of losing their water rights *or else taking their water rights status to the court* for determination." Hearings before the Subcommittee of the Committee on Indian Affairs, Indian Appropriations Bill 379 (1914), Wyo. Exh. WRIR I&P-15 (emphasis added). At most, the testimony

iso does not purport to terminate any rights under the 1868 Treaty, *see supra* note 20, and the 1905 Act contains a savings clause expressly protecting the preexisting treaty rights of the Indians against infringement by implication.[25] Pet. App. at 774a. Moreover, as the Supreme Court of Wyoming noted, Congress clearly "knew how to express a relinquishment of reserved water rights," *id.* at 30a, because it had done so explicitly in an agreement only ten years earlier with the Tribes in connection with the 1896 cession. First McLaughlin Agreement, 30 Stat. 62, 94 (ceding 55,000 acres "*and the water rights appertaining thereunto*") (emphasis added). In short, as the Wyoming courts correctly held, the water proviso falls far short of this Court's exacting requirements for finding a termination of Indian treaty rights.[26] Pet. App. at 30a.

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reveals that, in 1914, the Assistant Commissioner thought the Indians might "stand a chance" of losing water rights unless they went to court. Subsequently, of course, the government did go to court and established the water rights of the Tribes under the 1868 Treaty. United States v. Hampleman, *supra*; United States v. Parkins, *supra*.

[25] The savings clause of the 1905 Act provides:

> It is further understood that nothing in this agreement shall be construed to deprive the said Indians of the Shoshone or Wind River Reservation, Wyoming, of any benefits to which they are entitled under existing treaties or agreement, not inconsistent with the provisions of this agreement.

1905 Act at art. 10; Pet. App. at 774a.

[26] *E.g.*, County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985) (" 'Absent explicit statutory language,' . . . this Court . . . has refused to find that Congress has abrogated Indian treaty rights.") (citation omitted); F. Cohen, Handbook of Federal Indian Law 223 (1982) (the applicable standard is whether "Congress [has] show[n] a 'clear and plain' intention to abrogate Indian treaty rights").

There is no inconsistency between the rulings below and United States v. Dion, 476 U.S. 734 (1986), cited here by Wyoming, Pet. at 17, for the State has not provided "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that

In sum, Wyoming's argument regarding the water proviso was rejected, and correctly so, at every level of the Wyoming state court system. Moreover, the argument applies only to the Wind River Reservation because it turns on the unique statutory language, legislative history, and administrative interpretation of the water proviso, as underscored by the State's reliance below on 348 "intent and purposes" exhibits.[27] Accordingly, review is not warranted.

B. The Wyoming Courts Were Correct in Applying the PIA Standard To Quantify the Water Rights Reserved Under the Treaty for the Agricultural Purposes of the Reservation.

Review of the PIA issue is unwarranted. Wyoming is simply wrong in asserting that this Court has not resolved "[t]he appropriate quantification standard for reserved

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conflict by abrogating the treaty." 476 U.S. at 740. The State's reliance upon the legal standards set forth in Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), Pet. at 17, is also misplaced. Those standards, as more recently summarized in Solem v. Bartlett, 465 U.S. 463, 469-72 (1984), govern the issue whether—for purposes of determining the scope of state criminal, civil, or regulatory jurisdiction—a portion of an Indian reservation opened for non-Indian settlement has been disestablished from the original reservation. *See infra* pages 34-37. By contrast, the thrust of Wyoming's argument is that the water proviso abrogated the preexisting reserved water rights for the *entire* Reservation. This claim is subject to the exacting requirements of this Court for finding an abrogation of Indian treaty rights. County of Oneida, 470 U.S. at 247; Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 690 (1979).

[27] Even by Wyoming's own count, the issue is relevant to at most three other Indian reservations, Pet. at 12 n.10, and, on one of the three, the Fort Peck Indian Reservation, the State of Montana and the Assiniboine and Sioux Tribes have already reached a settlement under which those Tribes will have reserved rights to more than twice the amount of water quantified for the Shoshone and Northern Arapaho Tribes by the Wyoming courts. Mont. Code Ann. § 85-20-201 (1987). In any event, the terms of the statutes relating to those other Indian reservations are all quite different from the water proviso to the 1905 Act.

water rights of an agricultural Indian reservation." Pet. at 18. In *Arizona I*, this Court, in quantifying the reserved water rights for five agricultural Indian reservations, addressed this very issue and held that PIA—"enough water . . . to irrigate all the practicably irrigable acreage"—was "the only feasible and fair way by which reserved water for the reservations can be measured." 373 U.S. at 600, 601. As the Wyoming courts correctly held, the PIA standard remains good law. Pet. App. at 47a, 228a-29a, 532a.

In *Arizona I*, with respect to the issue of quantification, the Court first ruled that, when the five Indian reservations were established, water was reserved "to satisfy the *future* as well as the present needs of the Indian Reservations." 373 U.S. at 600 (emphasis added). In so ruling, the Court affirmed the decision of the Special Master, who had rejected the argument that the amount of reserved water was limited to the actual needs of the Indians when their reservations were established.[28] Report of Simon H. Rifkind, Special Master, *Arizona v. California*, No. 8 Original, at 260-61 (Dec. 5, 1960) ("Special Master's Report").

The Court in *Arizona I* next addressed the more difficult question of how to measure the reserved rights for the Indian reservations in a manner that would allow, as later described in *Arizona II*, "a fixed present determination of

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[28] In rejecting this argument, the Special Master noted:

> Certainly the possibility of expanding populations, expanding agricultural development, and hence expanding water needs must have been apparent at the time each Reservation was created. It is unreasonable to attribute to the United States an intention or an expectation that the Indians would remain stagnant or die out when they were settled on a Reservation. Since the Indians could remain on these Reservations and develop their society and economy only if water from the Colorado River was available to meet their future needs, I have found that the United States, when it reserved water, reserved it for all of such needs.

Special Master's Report at 260-61.

future needs for water." *Arizona II*, 460 U.S. at 623 (emphasis and footnote omitted). Arizona argued that the quantity of water reserved should be measured by the "reasonably foreseeable needs" of the Indians, which, as this Court noted, "in fact, means by the number of Indians." *Arizona I*, 373 U.S. at 600-01. The Special Master had rejected Arizona's population-based quantification standard, for he concluded that it would not yield a fixed present determination that adequately measured the future water needs on the Indian reservations.[29] This Court agreed, noting that "[h]ow many Indians there will be and what their future needs will be can only be guessed." *Id.* at 601.[30]

This Court then adopted the Special Master's recommendation that the amount of water reserved for the agricultural Indian reservations be measured not by Indian population, but rather by the amount of practicably irrigable acreage on the reservations. *Id.* at 600-01. As the Special Master had concluded, the PIA standard "will pre-

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[29] The Special Master rejected a population-based quantification standard for three reasons. First, a standard based solely on the water needs of the present Indian population "would defeat the basic purpose of reserving water to meet future requirements." Special Master's Report at 263. Second, an open-ended standard based on the needs of the present Indian population, but subject to adjustment as the Indian population increased, would provide neither the Indians nor the non-Indians with the requisite certainty of water availability to make long-term investment decisions regarding the development of their land. *Id.* at 264. Finally, a standard based on a present projection of future Indian population growth and water needs was rejected because of "the difficulty of predicting the future needs of Indian Reservations" and the risk that failing properly to foresee those needs "would result in a forfeiture of the Indians' water rights and would stultify development of the Reservations." *Id.* at 264.

[30] The Court also rejected Arizona's argument that the judicial doctrine of equitable apportionment, a method of resolving water disputes between States, should be used in quantifying the reserved water rights of the Indians. 373 U.S. at 596-97.

serve the full extent of the water rights created by the United States and will establish water rights of fixed magnitude and priority so as to provide certainty for both the United States and non-Indian users."[31] This Court agreed, concluding that the PIA standard was "the only feasible and fair way" to quantify reserved water rights for agricultural Indian reservations, 373 U.S. at 601, for, as this Court later summarized in *Arizona II*, "the irrigable-acreage standard allowed a present water allocation that would be appropriate for *future* water needs." 460 U.S. at 617 (emphasis added).

The PIA ruling in *Arizona I* was "hotly contested by the States, who argued that [the PIA standard was] a much too liberal measure." *Id.* Since then, the States have twice sought to overrule *Arizona I*, but this Court has rebuffed both attempts. *Cappaert*, 426 U.S. at 139 n.4; *Arizona II*, 460 U.S. at 625-26.

Wyoming again seeks to challenge the PIA standard, asserting here that it is at odds with a "rapidly evolving necessity standard" said to be evident in certain decisions of this Court since *Arizona I*.[32] Pet. at 23, 19-22. But each

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[31] Special Master's Report at 265. As the Special Master noted, the PIA standard was also consistent with the intent of the United States in establishing the Indian reservations because "the land originally withdrawn for each of the five Indian Reservations was considerably more extensive than was necessary to support the Indians who inhabited the Reservations immediately after their establishment." *Id.* at 262. According to the Special Master, "[t]he only explanation for this withdrawal of excess irrigable acreage is that the United States intended it to be utilized in the future. It must have been apparent that unless the United States reserved water for the land at the time of withdrawal, there might be no water left to appropriate at th. time that the land was needed for the purposes for which it was withdrawn." *Id.* at 262-63.

[32] Wyoming also seeks to distinguish this case from *Arizona I* on the ground that the Indian reservations in that case "had been set aside for the future requirements of unknown tribes." Pet. at 19. But this

of the decisions that Wyoming argues has eroded the vitality of *Arizona I* in fact followed that decision and cited it with approval.[33]

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point was not even mentioned in this Court's decision in *Arizona I*, and the portion of the Special Master's Report in *Arizona I* cited by Wyoming states only that "in *some* instances it was not clear *which* Indian tribes would ultimately be settled on a particular Reservation." Special Master's Report at 262 (emphasis added). In any event, at the time the Wind River Indian Reservation was established, it was not known that the Northern Arapahos would also be settling on the Reservation and making demands upon its water supply. *See* Shoshone Tribe v. United States, 299 U.S. at 486-92.

[33] Two of the cases cited by Wyoming, Cappaert v. United States, 426 U.S. 128 (1976), and United States v. New Mexico, 438 U.S. 696 (1978), involved the quantification of reserved water rights on non-agricultural federal enclaves. In each instance, the Court cited with approval to *Arizona I* for the proposition that reserved water rights are measured by "that amount of water necessary to fulfill the purpose of the reservation, no more." Cappaert, 426 U.S. at 141; United States v. New Mexico, 438 U.S. at 700. There was no express or implied criticism of the PIA standard. Indeed, *Arizona I* is cited as supporting and being fully consistent with the result reached in both decisions.

Wyoming is correct in suggesting that there were lesser awards in these decisions than in *Arizona I*. The reason for this is not that *Arizona I* is no longer good law, but rather that the policy considerations involved in the quantification of reserved water rights on federal enclaves are different from, and favor lesser awards than, those in cases quantifying reserved water rights for Indian reservations. *See infra* note 49; F. Cohen, Handbook of Federal Indian Law 581-85 (1982).

The third case on which the State relies, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) ("*Fishing Vessel*"), involved an apportionment of off-reservation fish between Indians and non-Indians. The Court in *Fishing Vessel* cited *Arizona I* and *Winters* as examples of prior court-ordered apportionments of natural resources between Indians and non-Indians "that assured that the Indians' reasonable livelihood needs would be met." 443 U.S. at 685-86. Again, there was no express or implied criticism of the PIA standard.

The final case cited by Wyoming, *Arizona II*, was an attempt by

Moreover, Wyoming is simply wrong in suggesting that the PIA standard in *Arizona I* is divorced from "any concepts of necessity."[34] Pet. at 21. The Court in *Arizona I*, noting that "water from the river would be essential to the life of the Indian people . . . and the crops they raised," specifically adopted the PIA standard as a means of quantifying reserved water for "the future as well as the present *needs* of the Indian reservations." 373 U.S. at 599, 600 (emphasis added). Similarly, as this Court noted in

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the Indian tribes involved in *Arizona I* to reopen the decree because they claimed that certain practicably irrigable lands had been omitted from the claims presented by the United States on their behalf in *Arizona I*. This Court held that the tribes were not permitted to relitigate this issue, in light of the "compelling need for certainty" and "the strong interest in finality" in Western water-rights adjudications. Arizona II, 460 U.S. at 620. In the passage cited by Wyoming, the Court was not casting doubt on the continuing vitality of *Arizona I*, but rather was explaining to the tribes that the need for finality applied with equal force to arguments that the States also desired to relitigate.

[34] Wyoming repeatedly asserts that the Wyoming courts erred in quantifying the reserved water rights of the Tribes "in the absence of any demonstrated necessity for the water." Pet. at 18, 21, 24. But the district court specifically found that "[w]ithout water, the reservation could never have accomplished it's [sic] prime purpose: the development of agriculture." Pet. App. at 211a. The district court further found that there are large unfarmed tracts of practicably irrigable acreage on the Reservation. *Id.* at 229a-30a, 258a. In these circumstances, the district court was correct in applying the PIA standard to quantify the water rights reserved under the Treaty for the agricultural purposes of the Reservation. *Id.* at 228a-29a.

The Wyoming courts also correctly held that, although the PIA standard is used to quantify the amount of water reserved by reference to the agricultural purposes of the Reservation, the Tribes are not limited to using this reserved water for farming, but rather may "make such use of the water covered by their reserved water rights as they deem advisable." Pet. App. at 183a, 194a. The State has not challenged this ruling. The only restrictions imposed by the Wyoming courts are that the Tribes may not increase their consumptive use of water and may not use the water off the Reservation. *Id.* at 183a. The Tribes are challenging the latter restriction in their conditional cross-petition in No. 88-492.

Arizona II, the PIA standard is "a measure [that] allow[s] a fixed present determination of future *needs* for water." 460 U.S. at 623 (emphasis omitted and added) (footnote omitted).

Wyoming is also wrong in asserting that there is "confusion" or "conflict[s]" among the lower courts regarding the PIA standard.[35] Pet. at 20-22; 23-26. The Supreme Court of Wyoming certainly was not confused; it reviewed all the cases cited here by Wyoming and concluded that PIA was the proper standard for quantifying the agricultural reserved water rights under the Treaty. Pet. App. 47a. Indeed, the Indian water-rights cases decided by the lower courts after *Cappaert* and *New Mexico* have uniformly followed the PIA standard set forth in *Arizona I*.[36]

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[35] The Ninth Circuit decisions said to be in conflict with the ruling of the Wyoming Supreme Court on the PIA issue, Pet. at 23-26, were both decided long before *Arizona I*, and the Ninth Circuit, citing to *Arizona I*, has recently observed that "the scope of Indian irrigation rights is well settled." United States v. Adair, 723 F.2d 1394, 1415 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984). In any event, the Ninth Circuit decisions are not in conflict with the ruling below, and indeed the Special Master in *Arizona I* had specifically stated that the Ninth Circuit decisions relied upon here by Wyoming were entirely consistent with using the PIA standard. Special Master's Report at 261, 258-60.

Wyoming relies on White Mountain Apache Tribe v. United States, 11 Cl. Ct. 614 (1987) as the single example of confusion among the lower courts. But the quoted passage from that case does not reveal any confusion, and, in any event, the Court of Claims acknowledged that "this is not a Winters doctrine case insofar as the Court of Claims lacks jurisdiction to adjudicate claims over plaintiff's reserved water rights in terms of future use." *Id.* at 626.

[36] United States v. Anderson, 736 F.2d 1358, 1361 (9th Cir. 1984), *affirming* 591 F. Supp. 1, 8-9 (E.D. Wash. 1982); United States v. Adair, 723 F.2d 1394, 1415-16 (9th Cir. 1983), *affirming* 478 F. Supp. 336 (D. Ore. 1979), *cert. denied*, 467 U.S. 1252 (1984); Colville Confederated Tribes v. Walton, 647 F.2d 42, 48 (9th Cir. 1981), *affirming* 460 F. Supp. 1320, 1329-31 (E.D. Wash. 1978), *cert. denied*, 454 U.S.

This Court was correct in *Arizona I* in holding that the PIA standard is "the only fair and feasible way" to measure Indian reserved water rights for agricultural purposes. Wyoming never explains why it believes this Court's original PIA ruling was wrong or what quantification standard it believes should be used in this context.[37] The thrust of Wyoming's argument appears to be that the Wyoming courts erred in quantifying an amount of reserved water in excess of "the Reservation's historical needs." Pet. at 26. But this argument was quite properly rejected in *Arizona I*,[38] and Wyoming has offered no persuasive reason

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1092 (1981); Montana v. Confederated Salish and Kootenai Tribes, 712 P.2d 754, 764 (Mont. 1985).

[37] In the proceedings below, Wyoming asserted that the PIA standard was too generous a measure of the reserved water rights under the Treaty, for, according to Wyoming, the Indians were only entitled to an amount of reserved water for their "minimal" or "moderate living" needs on the Reservation. Brief of Appellant State of Wyoming (Type 1 Claims) 51 (Dec. 5, 1985). But the State never proffered any evidence at all to support the assertion that the amount of reserved water quantified under the PIA standard exceeded the "minimal needs" or "moderate living" requirements of the Indians.

Nor was there any such evidence to proffer. The water quantified under the PIA standard is desperately needed to improve the economy on the Reservation, where, according to a governmental study released last month, the unemployment rate among Indians is in excess of seventy per cent. Riverton (Wyo.) Ranger, Oct. 13, 1988, at 1. This figure is up substantially from the forty-five per cent figure cited in the 1982 Report of Special Master Roncalio. Pet. App. at 568a-69a.

[38] The Special Master in *Arizona I* concluded that "[i]t is clear that the water rights of the five Reservations in question cannot be fixed at present uses for this would defeat the basic purpose of reserving water to meet future requirements." Special Master's Report at 263. This Court agreed, ruling that the reserved water "was intended to supply the future as well as the present needs of the Indian Reservations." Arizona I, 373 U.S. at 600. This ruling has not been eroded by subsequent decisions of this Court. *See supra* note 33.

There is no merit to the argument that the Wyoming courts erred in quantifying the reserved water rights under the Treaty in excess of

why this Court should reconsider the PIA standard that has now been followed for twenty-five years in litigation and settlements throughout the West. Accordingly, review should be denied.

C. The Supreme Court of Wyoming Correctly Assigned a Priority Date of 1868—the Date of the Treaty—to the Reserved Water Rights Under the Treaty.

In accordance with this Court's ruling in *Arizona I* that reserved water rights "vest[]" and become "effective" at the time an Indian reservation is created, 373 U.S. at 600, the Supreme Court of Wyoming correctly assigned an 1868 priority date to the water rights reserved under the Treaty. Pet. App. at 72a-75a. Wyoming seeks review of this ruling as it applies to the water rights associated with certain portions of the Reservation.

1. Lands Opened for Non-Indian Settlement, But Not Sold, Under the 1905 Act

Wyoming first challenges this ruling as it applies to the water rights associated with the Reservation lands that were opened for non-Indian settlement under the 1905 Act but never sold (the "unsold lands"). Wyoming asserts that an 1868 priority date should not be assigned to these water rights because the unsold lands were "disestablished" from the Reservation by the 1905 Act.

Review of this issue is not warranted. At the outset, the issue whether the 1905 Act disestablished the unsold lands is beside the point, for it relates only to the jurisdictional authority of the State over these lands, not to the priority date to be assigned to the water rights associated with these lands.[39] In any event, even if the dis-

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the Tribes' historical irrigation needs because, as Wyoming asserts, the Reservation has already achieved "full irrigation development." Pet. at 23-26. As previously noted, Wyoming's assertion that the Reservation has achieved "full irrigation development" is directly contrary to the findings of the Wyoming courts. *See supra* page 14.

[39] The disestablishment cases decided by this Court have involved

establishment issue were relevant, this Court has already resolved the governing legal standards, and the Wyoming courts correctly applied those standards in reaching the fact-specific ruling that these particular lands were not disestablished. Pet. App. at 411a, 225a, 75a.

At the turn of the century, Congress enacted a number of so-called "surplus land" or "opening" acts—such as the 1905 Act—that opened Indian reservations to non-Indian settlement and have since resulted in "a spate of jurisdictional disputes" regarding the status of the opened lands.[40] *Solem v. Bartlett*, 465 U.S. 463, 466-67 (1984) ("*Solem*"). This Court, after resolving a number of these

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disputes regarding the extent of state jurisdiction over civil, criminal, or regulatory matters on a portion of an Indian reservation opened for settlement under a surplus-land act. *E.g.*, Solem v. Bartlett, 465 U.S. 463 (1984). By contrast, the thrust of Wyoming's argument here is that the 1905 Act terminated any reserved water rights under the 1868 Treaty for the unsold lands in the opened portion of the Reservation. Wyoming fails to explain why the reserved water rights for the unsold lands were lost under the 1905 Act, which simply established a trust arrangement for possible land sales to non-Indians, pursuant to which less than 10 per cent of the opened lands were sold. In rulings affirmed by the Wyoming courts, the Special Master correctly held that the Tribes had retained unbroken equitable title to the unsold lands under the 1905 Act, and that "[n]othing in the 1905 Agreement, nor the circumstances surrounding it, would lead one to conclude that the Indians or the [United States] intended that the water rights associated with the opened or ceded lands disappear as of the date of the Agreement." Pet. App. at 415a-16a, 420a, 225a, 75a.

The disestablishment issue was relevant in this case to the issue of the State's jurisdiction over the administration of water rights on the opened portion of the Reservation, *id.* at 75a-79a, but the State has elected not to seek review of the ruling below on that issue.

[40] The resolution of these disputes has been complicated by the fact that there is a notable lack of uniformity among the surplus-land acts, for Congress proceeded "on a reservation-by-reservation basis, with each surplus land Act employing its own statutory language, the product of a unique set of tribal negotiation and legislative compromise." Solem v. Bartlett, 465 U.S. 463, 467 (1984).

disputes, has now developed a "fairly clean analytical structure" for determining whether, for jurisdictional purposes, the opened lands remain part of the original Indian reservation or have been "disestablished" by the surplus-land act from what remains as the "diminished" reservation. *Id.* at 470.

Those legal standards, which are summarized in *Solem*, 465 U.S. at 469-72, involve a case-by-case inquiry, because "[t]he effect of any given surplus land Act depends on the language of the Act and the circumstances underlying its passage." *Id.* at 469. Because there is a "presumption" that such acts do not diminish a reservation, *id.* at 481, this Court has required "substantial and compelling evidence of a congressional intention to diminish Indian lands." *Id.* at 472.

The Wyoming courts correctly applied these settled legal standards in concluding that neither the terms of the 1905 Act nor the circumstances surrounding the opening of the Reservation provide the requisite evidence of a congressional intention to disestablish the opened lands. Pet. App. at 420a, 225a, 75a. The Special Master, whose rulings were affirmed by the Wyoming courts, concluded that the 1905 Act had not disestablished the opened lands, for it had simply established "a trust relationship, with the United States acting as [the Tribes'] trustee for the sale of certain Indian lands to settlers."[41] *Id.* at 415a. Because of this

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[41] Although the 1905 Act refers to the cession of the opened lands, the United States specifically agreed under the 1905 Act to act only "as trustee for said Indians to dispose of [the opened] lands," and obligated itself to pay the Tribes "the proceeds received from the sale [of the opened lands] only as received." 1905 Act at arts. 1, 9; Pet. App. at 769a, 774a. Thus, the 1905 Act, unlike the 1872 and 1896 cessions, *see supra* note 1, was not an outright sale of Reservation lands in return for a fixed cash payment. Indeed, a provision of the 1905 Act recognizes that some of the opened portion of the Reservation would "remain the property of said Indians." 1905 Act at art. 3; Pet. App. at 772a.

trust arrangement, Indian title to the opened but unsold lands was "not extinguished" by the 1905 Act. *Id.* at 638a. The Special Master specifically concluded that "[n]othing in the 1905 Agreement, nor the circumstances surrounding it, would lead one to conclude that the Indians or the [United States] intended that the water rights associated with the opened or ceded lands disappear as of the date of the Agreement." Pet. App. at 420a.

The rulings below are not in conflict with the decisions cited here by Wyoming. Contrary to Wyoming's assertion that this case involves "circumstances virtually identical" to those in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), Pet. at 28, the Special Master specifically concluded that "this case—and its 1905 Act—differ substantially from the facts and circumstances involved in Rosebud."[42] Pet.

In light of this statutory language and the circumstances surrounding the opening of the Reservation in 1905, the Special Master, in a ruling affirmed by the Wyoming courts, held that the intent of the 1905 Act was not to disestablish the opened portion of the Reservation, but rather for "the Indians [to] convey to the United States only the right to dispose of [these] lands, i.e., to act as an agent with the power of attorney necessary to pass perfect title to a purchaser." Pet. App. at 414a.

[42] One prominent consideration in *Rosebud*, as later summarized in *Solem*, was that "non-Indian settlers flooded into the opened portion of [the] reservation and the area ha[d] long since lost its Indian character." *Solem*, 465 U.S. at 471. By contrast, on the Wind River Reservation, less than ten per cent of the opened lands were acquired by non-Indian settlers under the 1905 Act, Pet. App. at 412a-13a, and the vast majority of the opened lands that were not sold under the 1905 Act are still owned by the Tribes.

Wyoming focuses on the fact that the Special Master had distinguished this case from *Rosebud* by the absence of the word "convey" in Article I of the 1905 Act. Pet. at 28. But the Special Master treated this point as only one "example" of why "this case—and its 1905 Act—differ substantially from the facts and circumstances involved in Rosebud." Pet. App. at 419a.

App. at 419a. Nor, as Wyoming asserts, is "the reasoning below in conflict with the principles announced in" *Oregon Department of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985) ("*Klamath*"), and *Arizona II*.[43] Pet. at 28. Finally, Wyoming's repeated assertion that the opened, but unsold, lands on the Reservation were "public lands," Pet. at 27, 4, 6, was correctly rejected not only by the Wyoming courts in this case,[44] but also by the Department of the Interior in a proceeding nearly four decades ago.[45]

In sum, even if the disestablishment issue were relevant, the Wyoming courts correctly applied this Court's well-settled legal standards to the particular facts surrounding the 1905 Act. Review is not warranted.

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[43] Because the diminution of the Indian reservation in *Klamath* had been "acknowledged," 473 U.S. at 772 n.22, the Court's analysis of the "savings clause" in that case focused on what treaty rights had survived the conceded diminution of the reservation. By contrast, the question here is whether—in light of the "savings clause" to the 1905 Act, the other provisions of that Act, and the surrounding circumstances—Congress intended to terminate the reserved water rights under the 1868 Treaty for the opened, but unsold, lands.

Similarly, the State's reliance on *Arizona II* is misplaced because the portion of that decision cited here by the State refers to the proper priority date to be assigned to water rights associated with *new* lands that the United States has added to an Indian reservation after it was established. 460 U.S. at 641. By contrast, the issue presented here is whether the water rights associated with lands that were part of the *original* Reservation are entitled to a Treaty-based priority date.

[44] In a ruling affirmed by the Wyoming courts, the Special Master properly concluded that the unsold lands were not public lands, but rather had always remained "Indian lands" under this Court's controlling decision in Ash Sheep Co. v. United States, 252 U.S. 159 (1920). Pet. App. at 415a-16a.

[45] *In re Gallivan*, 60 I.D. 417, 419 (1950) (ruling that the federal statute governing mineral leasing on "public lands," 41 Stat. 437 (1920), was inapplicable to "the ceded but undisposed-of lands" on the Reservation, because these were "Indian lands").

2. Reservation Lands Reacquired by the Tribes

Wyoming asserts that the Supreme Court of Wyoming erred in assigning an 1868 priority date to the water rights associated with Reservation lands that have been reacquired by the Tribes from non-Indians who had purchased the land from individual Indian allottees ("reacquired allottee lands") or had acquired it under the homestead laws ("reacquired homestead lands"). The ruling below is said to conflict with two Ninth Circuit decisions. *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984) (*"Anderson"*); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981) (*"Walton II"*).

Review of this question is not warranted.[46] With respect to the water rights associated with the reacquired allottee lands, Wyoming asserts that the ruling below is in conflict with *Walton II* and *Anderson* because the Supreme Court of Wyoming "required no showing [by the Tribes] that the reserved right continued to be used by the intervening non-Indian owner[s]." Pet. at 29. The Ninth Circuit cases hold that reserved water rights on lands previously held by allottees are lost if not maintained through continuous use by the subsequent non-Indian owner. *Anderson*, 736 F.2d at 1362; *Walton II*, 647 F.2d at 51. But, in this proceeding—where the Tribes have consistently claimed an 1868 priority date for the reserved water rights associated with the reacquired allottee lands—, neither Wyoming nor any other party made a proffer that any of these reserved water rights had in fact been lost through non-use. Because there was no such proffer, the Supreme Court of Wyoming, in a ruling fully consistent with the Ninth Cir-

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[46] If this Court were to grant review of this question, the Tribes agree with Riverton, Cross-Pet. at 22, that the Court should review the question as it applies not only to the reserved water rights claimed by the Tribes, but also to those claimed by the non-Indians who asserted reserved water rights in this proceeding. *See* Tribes' Cross-Petition at 29-30.

cuit decisions, properly assigned these water rights a Treaty-based priority date of 1868.

Nor is it apparent that there is a conflict with the Ninth Circuit regarding the priority date for the reserved water rights associated with the reacquired homestead lands. The opinion below does not expressly address this question, *see* Pet. App. at 75a, and the Supreme Court of Wyoming could well have concluded that, here too, Wyoming had failed to make the appropriate proffer. In any event, there is no express or implied criticism of *Anderson* in the decision of the Supreme Court of Wyoming and thus no conflict that would be apparent to other courts that might later address the issue.[47]

D. The Supreme Court of Wyoming Demonstrated More than Ample "Sensitivity" to Non-Indian Water Users.

Riverton asserts that the decision of the Supreme Court of Wyoming is in conflict with *United States v. New Mexico*, 438 U.S. 696 (1978) (*"New Mexico"*). According to Riverton, *New Mexico* "instructs that the quantification of a Federal reserved water right must be sensitive not only

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[47] In any event, the issue whether a non-Indian settler has acquired reserved water rights when purchasing lands on an Indian reservation would necessarily depend on the terms of the specific surplus-land act that opened the Indian reservation to non-Indian settlement. There is considerable variety among these statutes because they were enacted "on a reservation-by-reservation basis, with each surplus land Act employing its own statutory language, the product of a unique set of tribal negotiation and legislative compromise." Solem, 465 U.S. at 467. Accordingly, the mere existence of different results between two decisions on this issue does not necessarily mean that there is a conflict between them.

Moreover, even assuming *arguendo* that there was an implicit conflict with *Anderson* and that the decision below was in error, resolving this issue will have no practical effect upon the parties, for, as previously noted, the state district court deleted its only finding that the quantification of reserved water rights in this proceeding will have any adverse effect on other water users. *See supra* note 8.

to Congress' policy of deference to state water law, but also to the rights of state and private water users who are the victims of the quantification." Cross-Pet. at 10-11. Riverton urges this Court to grant review "to apply its decision in *United States v. New Mexico*, and thereby to protect state and private water users in the Big Horn Basin from a gallon-for-gallon reduction in their water rights, and to rescue the 1905 Act from the dustbin of history." *Id.* at 11.

This argument is vastly overblown, and review is not warranted. Two of the reasons why have already been noted: First, the Supreme Court of Wyoming specifically found that this case does *not* give rise to the concern expressed in *New Mexico*, 438 U.S. at 705, that reserved water rights may "require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators." *See supra* pages 12-13. Second, the Wyoming courts carefully analyzed the 1905 Act and correctly concluded that Congress had not deferred to state law for the acquisition of water rights for the Reservation. *See supra* pages 19-24. In short, neither of the two factors cited by Riverton as warranting "sensitivity" under *New Mexico*—reductions in available water to non-Indian users and congressional deference to state water law—is even presented in this case.

In any event, the Supreme Court of Wyoming demonstrated more than ample sensitivity to the needs of non-Indian water appropriators.[48] In response to the same ar-

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[48] Riverton appears to read *New Mexico* as requiring the imposition of "equitable" remedies to protect non-Indian water users from any adverse impact arising from the quantification of reserved water rights. Cross-Pet. at 17. But no such remedies were even considered in *New Mexico*, and this Court has consistently rejected the argument that reserved water rights must be balanced against the state water rights of junior appropriators. *Winters*, 207 U.S. at 570-71, 576 (rejecting claim of junior non-Indian water users who had already invested "many

gument presented here, the Supreme Court of Wyoming cited a number of key rulings it had rendered against the Tribes and the United States and concluded that "[a]ll of this evidences a sufficient sensitivity to the water needs of other water users." Pet. App. at 72a. Indeed, as set forth in the Tribes' conditional cross-petition, the state supreme court was excessively sensitive to the needs of non-Indian water users, for several of the key rulings against the Tribes and the United States are in error.

Finally, whereas Riverton asserts that the Wyoming courts lacked "sensitivity" towards the non-Indian water users, Riverton itself is wholly lacking in any sensitivity to the different policy considerations involved in cases quantifying Indian reserved water rights, such as this proceeding, than in cases quantifying federal reserved water

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thousands of dollars" and who claimed that, if senior reserved water rights were recognized, "their lands will be ruined, it will be necessary to abandon their homes, and they will be greatly and irreparably damaged"); Arizona I, 373 U.S. at 596-97 (rejecting the argument that "equitable apportionment" should be "used to divide the water between the Indians and the other people in the State of Arizona"); Cappaert, 426 U.S. at 138-39 (rejecting the argument that reserved water rights "call[] for a balancing of competing interests" and adhering to both *Winters* and *Arizona I*).

Accordingly, the Supreme Court of Wyoming correctly rejected the proposed storage requirements and other limitations on the exercise by the Tribes of their reserved water rights. As noted below, "[t]he requirement that [the Tribes] must first construct storage facilities to supply their entitlement flies in the face of the object of the reserved water right—a prior entitlement to the waters." Pet. App. at 71a.

When read in proper context, the comment regarding "sensitivity" in Justice Powell's partial dissent in *New Mexico*, 438 U.S. at 718, and the passages of the majority opinion relied upon here by Riverton, 438 U.S. at 700, 701-02, 705, simply stand for the proposition that the courts should engage in a careful examination of the purposes for which water was impliedly reserved. That was done in this proceeding, and indeed the Court in *New Mexico* specifically cites both *Winters* and *Arizona I* as examples of that careful consideration. 438 U.S. at 698-705.

rights, such as *New Mexico*.[49] Those differences favor lesser awards in federal cases, than in Indian cases.

In sum, Riverton is simply wrong in asserting that "[t]he circumstances of this case fall squarely within *New Mexico*." Cross-Pet. at 13. In any event, the ruling of the Supreme Court of Wyoming is fully consistent with this Court's decision in *New Mexico*.

E. Riverton's Discount-Rate Argument Is Without Merit and Unworthy of Review.

Riverton contends that the Wyoming courts erred, in assessing the economic feasibility of possible future irrigation of presently undeveloped tribal lands, by using an economic discount rate lower than one prescribed by a federal statute, 41 U.S.C. § 1962d-17(a), for the formulation and evaluation of federal water projects. Cross-Pet. at 19-22. Credible expert testimony supported the discount rate (4 per cent) used by the Wyoming courts. *See* Pet. App. at 53a-54a. Riverton claims that, nonetheless, the courts were required to use 7-1/8 per cent, the rate prescribed under the federal statute for the year 1979.

On its face, the statute on which Riverton relies has no application to quantification of Indian water rights. Riverton cites no authority suggesting such an application, and relies weakly on one decision holding only that Con-

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[49] Among other considerations, the reserved water rights here were established under a Treaty with the United States as opposed to unilateral action by Congress or the President in establishing non-Indian federal public lands; non-Indian federal water rights can be disposed of by the federal government without limitation, but Congress cannot abrogate Indian treaty rights without providing just compensation; and public lands of the federal government are generally subject to state regulation, whereas Indian lands are not. The award of water to fulfill the primary purpose of maintaining a national forest should be smaller than a quantification of the water rights necessary to establish a permanent Indian settlement. *See* F. Cohen, Handbook of Federal Indian Law 581-85 (1982).

gress intended the statutory rate to be used in environmental-impact statements. Cross-Pet. at 22 n.27 (citing *Johnson v. Davis*, 698 F.2d 1088, 1092 (10th Cir. 1983)). Riverton's argument also depends on its assumption that the Tribes could implement future irrigation projects only by obtaining federal funds, which is sheer speculation. Even if they did so, and that were held to make the statute relevant, any applicable discount rates under the statute would be those in effect at the future times when the projects were proposed and evaluated, which of course is presently unknowable. The rate for the year 1979 would have no relevance whatever.

The Wyoming courts correctly held that the statute does not mandate using the 7-1/8 per cent rate in this proceeding. Pet. App. at 53a-54a. Review of this question is unwarranted.

F. The Supreme Court of Wyoming Correctly Rejected Riverton's Estoppel Argument.

Riverton argues that the Wyoming courts erred in not holding the United States estopped from asserting reserved water rights on behalf of the Tribes. Cross-Pet. at 24-30. This claim of estoppel is not based on alleged misrepresentations by federal officials. Rather, Riverton asserts that the United States should be estopped because of the acts of "Congress itself," namely, the passage of the various homesteading acts and the 1905 Act. Cross-Pet. at 26 & n.37.

Review of this insubstantial claim should be denied. This Court has "left open the possibility of estoppel against the Government only in a rather narrow possible range of circumstances," *Heckler v. Community Health Services*, 467 U.S. 51, 68 (1984) (Rehnquist, J., concurring in judgment), and the Supreme Court of Wyoming correctly held that this case does not present such circumstances. Pet. App. at 22a-23a. Although Riverton focuses on attacking the ruling below that "affirmative misconduct" by the United

States had not been established, Riverton and the other moving parties failed to prove several other essential elements of estoppel, including detriment to their state water rights and reasonable reliance upon the 1905 Act.[50] In any event, even if the United States were estopped in this proceeding, the water rights reserved under the Treaty are rights of the Tribes, not the United States. Riverton has not even contended that the Tribes' conduct is a basis for its estoppel claim, nor has Riverton explained how conduct of the United States vis-à-vis non-Indian settlers can affect the Tribes' rights under the Treaty.

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[50] The state district court specifically deleted the finding upon which Riverton's claim of detriment to state water rights is based. *See supra* note 8. Moreover, Riverton cannot show reasonable reliance based on the water proviso to the 1905 Act because, as the Wyoming courts correctly held, the proviso was intended to assist the Indians in securing state water rights not in lieu of their reserved water rights under the 1868 Treaty, but rather as a pre-*Winters* precaution to safeguard their right to water. *See supra* pages 19-24. In any event, the United States formally began to assert reserved water rights on behalf of the Tribes after this Court's 1908 ruling in *Winters*, and the federal district court expressly recognized such rights in 1926. *See supra* pages 10-12.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition in No. 88-309 and the Cross-Petition in No. 88-553.

Respectfully submitted,

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November 21, 1988

APPENDIX

EXHIBIT A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WYOMING

No. 753.

UNITED STATES OF AMERICA,

Plaintiff.

vs.

ALBERT HAMPLEMAN,

Defendant.

D E C R E E

Now on this day the above entitled cause coming on to be heard, the plaintiff appearing by DAVID J. HOWELL, Assistant United States Attorney for the District of Wyoming, and the defendant, ALBERT HAMPLEMAN, appearing by his attorneys, DOUGLAS A. PRESTON, Attorney General for the State of Wyoming, and WILFRID O'LEARY, Deputy Attorney General for the State of Wyoming, and a stipulation by and between the parties hereto having heretofore been filed admitting certain of the allegations contained in plaintiff's bill of complaint, and the Court having heard the testimony of the witnesses produced by said plaintiff, and the arguments of counsel, and being fully advised in the premises, doth find for the plaintiff, and against the defendant, generally, and that the lands, ditches and water rights of the Indian allottees named in plaintiff's bill of complaint are within the absolute and exclusive jurisdiction of plaintiff.

IT IS THEREFORE CONSIDERED, ORDERED AND DECREED, that the defendant, ALBERT HAMPLEMAN, his servants, agents and employees, be, and they are hereby perpetually enjoined from hereafter committing any

trespass upon, or from in any manner impeding, obstructing or preventing the waters of South Fork of Mud Creek and of Red Creek from flowing down their natural channels to the headgates of the said Indian allottees named in plaintiff's bill of complaint, and from in any manner interfering with or preventing the use by said Indian allottees of an amount of water from said streams reasonably necessary for the irrigation of their said allotments on the basis of one cubic foot of water per second of time for each seventy (70) acres of irrigable land on said allotments.

IT IS FURTHER ORDERED that the defendant herein shall pay the costs of this action, to be taxed.

Dated this 26th day of June, A.D. 1916.

(Signed) John A. Riner

Judge.

EXHIBIT B

AGREEMENT REGARDING WATER RIGHTS IN THE CROWHEART IRRIGATION UNIT ON THE WIND RIVER INDIAN RESERVATION

WHEREAS there has arisen a dispute between Indian and non-Indian irrigators in the Crowheart Irrigation Unit ("Unit") on the Wind River Indian Reservation ("Reservation") regarding their respective rights to water in the Dinwoody Canal;

WHEREAS the Shoshone and Arapaho Tribes ("Tribes") and the State of Wyoming ("State") have endeavored to resolve this dispute through joint-factfinding and negotiation;

WHEREAS the Tribes and the State agree that the water shortages experienced during this growing season on particular fields in the Unit are not the result of an actual shortage of water supply, but rather are the result of problems with the management of the water supply and of the need for structural improvement in the irrigation and delivery system;

WHEREAS the Tribes and the State believe that, with proper management of the Unit, the Indian and the non-Indian irrigators should be able to get the full amount of water to which they would be legally entitled;

NOW, THEREFORE, be it resolved that the Tribes and the State agree as follows:

1. The Unit should be managed as efficiently as practicable, so that, if possible, the Indian and the non-Indian irrigators are able to get the full amount of water to which they would be legally entitled.

2. There shall be created a Joint Tribal-State Advisory Committee ("Committee") for the purpose of making joint recommendations to the Bureau of Indian Affairs ("BIA")

regarding any necessary changes to the management of the Unit. The Tribes and the State shall each appoint one representative to the Committee.

3. In the event that the representatives of the Committee are unable to make a joint recommendation, the Tribes and the State are free to pursue their respective rights under the Decree in the Big Horn Water Adjudication and such other rights as they may have. This agreement does not waive any rights that the Tribes or the State have under the Decree or otherwise, but rather establishes a means by which the Tribes and the State will first attempt to resolve any disputes regarding the supply of water within the Unit before resorting to litigation.

4. This agreement shall expire on October 1, 1988, unless extended in writing by the Tribes and the State.

The Shoshone Tribe

Date: 7/29/88 By: /s/ John Washakie

The Arapaho Tribe

Date: 7/29/88 By: /s/ Gary Collins

The State of Wyoming

Date: 7/29/88 By: /s/ Mike Sullivan

Supreme Court, U.S.
FILED
NOV 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

(6) (3) (4)

Nos. 88-309, 88-492 and 88-553

In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF WYOMING, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, CROSS-PETITIONERS

v.

STATE OF WYOMING, ET AL.

CITY OF RIVERTON, WYOMING, ET AL., CROSS-PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION AND CROSS-PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED[1]

1. Whether the "water proviso" of the Act of March 3, 1905 (33 Stat. 1020)—which provides that the remaining balance of an $85,000 sum to be obtained from the sale of certain lands of the Wind River Indian Reservation shall, following a per capita distribution of $50 per Indian, "become available and shall be devoted to surveying, platting, making of maps, payment of the fees, and the performance of such acts as are required by the statutes of the State of Wyoming in securing water rights from said State for the irrigation of such lands as shall remain the property of said Indians, * * * "—demonstrates that no federal reserved water rights were created when that Reservation was set aside in 1868 by the Second Treaty of Fort Bridger, or, alternatively, whether that water proviso terminated all reserved water rights created by the 1868 Treaty.

2. Whether the Act of March 3, 1905, which provided for the sale of certain reservation lands of the Wind River Indian Reservation and further provided that the Indians were to be compensated out of the sales proceeds as the lands were sold, terminated the federal reserved water rights attaching to lands that were never sold.

3. Whether this Court should reconsider its holding in *Arizona* v. *California,* 373 U.S. 546 (1963), that the amount of water reserved for agricultural purposes when an Indian reservation is established is that quantity of water that is required to irrigate the practicably irrigable acreage within the reservation.

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[1] This summation of the questions presented encompasses only those questions raised in the petition filed by the State of Wyoming in No. 88-309 and the cross-petition filed by the City of Riverton, Wyoming, et al., in No. 88-553. As discussed in the text below, the United States suggests that the Court grant review of the additional questions presented in the conditional cross-petition filed by the Shoshone and Northern Arapaho Tribes in No. 88-492, in the event that the Court grants the State's petition.

4. Whether the Wyoming Supreme Court erred by failing to use the discount rate formula established pursuant to Section 80(a) of the Water Resources Development Act of 1974, 88 Stat. 34, 42 U.S.C. 1962d-17(a), to determine whether certain reservation lands that have never been irrigated are practicably irrigable.

5. Whether the Wyoming Supreme Court correctly resolved issues concerning the status of water rights for lands that had at some previous time been conveyed to non-Indians.

6. Whether the United States may be estopped in this case from asserting reserved water rights on behalf of the Indian Tribes pursuant to a federal treaty.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-309

STATE OF WYOMING, PETITIONER

v.

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No. 88-492

SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, CROSS-PETITIONERS

v.

STATE OF WYOMING, ET AL.

No. 88-553

CITY OF RIVERTON, WYOMING, ET AL., CROSS-PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION AND CROSS-PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Wyoming Supreme Court (Pet. App. 1a-119a) is reported at 753 P.2d 76. The district court's amended judgment and decree (Pet. App. 168a-184a), order ruling on motions to alter or amend the decision

(Pet. App. 185a-210a), and decision (Pet. App. 202a-279a) are not yet reported. The report and decree of the special master (Pet. App. 367a-708a) are also unreported.

JURISDICTION

The decision of the Wyoming Supreme Court (Pet. App. 1a) was entered on February 24, 1988. Timely petitions for rehearing were denied on April 22, 1988 (Pet. App. 120a). On July 7, 1988, Justice White extended the time for filing a petition for a writ of certiorari to August 20, 1988. The petition for a writ of certiorari was filed on August 18, 1988. The cross-petitions in Nos. 88-492 and 88-553 were filed on September 21, 1988, and are timely under Rule 19.5 of the rules of this Court. The jurisdiction of this Court over the petition and cross-petitions is invoked under 28 U.S.C. 1257(3).

STATEMENT

The State of Wyoming petitions for a writ of certiorari to review the Wyoming Supreme Court's decision, in the first phase of a general stream adjudication, recognizing the reserved water rights of the Shoshone and Northern Arapaho Indian Tribes. The Indian Tribes and certain non-Indian respondents have filed cross-petitions for a writ of certiorari.

1. In 1977, Wyoming enacted legislation authorizing its Attorney General to "institute an action to have determined in a general adjudication the nature, extent, and relative priority of the water rights of all persons in any river system and all other sources * * * " (Wyo. Stat. § 1-37-106 (1977) (Pet. App. 726a-728a)). The State then promptly commenced this action in the Wyoming District Court for the Fifth Judicial District. The complaint sought a general adjudication of the rights to use water in Water

Division No. 3, which consists primarily of that portion of the Big Horn River drainage system located within Wyoming, including the Wind River Indian Reservation.[2] The complaint requested, in essence, a determination of all water rights within Water Division No. 3. The United States was joined under the McCarran Amendment, 43 U.S.C. 666.

The state district court, after granting intervention for the Shoshone Tribe and the Northern Arapaho Tribe of the Wind River Reservation, referred the case to a special master.[3] The special master divided the case into three phases. Phase I—the phase at issue here—encompasses water rights reserved by federal law and held by the Shoshone and Northern Arapaho Tribes or by the United States on their behalf, and Indian reserved rights claimed by non-Indian successors to Indian allottees.[4]

a. The Wind River Indian Reservation was established on July 3, 1868, by the Second Treaty of Fort Bridger, 15 Stat. 673 (Pet. App. 793a-803a), which was entered into by the United States and the Shoshone and Bannock Tribes.[5]

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[2] Water Division No. 3 also included the Clark's Fork of the Yellowstone River (Pet. App. 9a).

[3] The United States had initially removed the action to the United States District Court for the District of Wyoming, but that court remanded the suit back to state court (Pet. App. 718a-724a).

[4] Phase II covers all non-Indian reserved water rights claimed by the United States in Water Division No. 3, while Phase III involves all water rights in that division not covered by Phases I and II. Phase III includes rights evidenced by state permits or certificates held by the United States, its agencies, and the Shoshone and Arapaho Tribes. Phase II was resolved by a stipulation and judgment, while Phase III is still pending (Pet. App. 13a-15a).

[5] The Bannock Tribe, as provided in Article II of the 1868 Treaty (15 Stat. 674), subsequently chose for itself the Fort Hall Reservation in what is now the State of Idaho. There is also a band of Shoshone Indians on the Fort Hall Reservation.

Under the 1868 Treaty, the Shoshone Tribe relinquished to the United States all claims to more than 44 million acres in what are now the States of Colorado, Utah, Idaho, and Wyoming.[6] In return, the Shoshone Tribe accepted the Wind River Reservation in what is now Wyoming. The Reservation consisted of approximately 3 million acres "set apart for the absolute and undisturbed use and occupation of the Shoshone Indians * * * and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them" (art. II, 15 Stat. 674). The Indians agreed to make the Reservation their permanent home (art. IV, 15 Stat. 674-675). The Treaty provided for the allotment of reservation lands to individual Indians who "shall desire to commence farming" (art. VI, 15 Stat. 675) and further provided for seeds, implements, and agricultural instruction for Indians who commenced cultivation (art. VIII, 15 Stat. 675-676). In 1878, the Northern Arapaho Tribe was settled on the Wind River Reservation without the consent of the Shoshone Tribe. See *United States* v. *Shoshone Tribe*, 304 U.S. 111, 114 (1938).

By an agreement signed in 1904 and approved with modification by the Act of March 3, 1905, ch. 1452, 33 Stat. 1016 (Pet. App. 769a-781a), the Shoshone and Northern Arapaho Tribes agreed to "cede, grant, and relinquish to the United States, all right, title, and interest * * * " in the portion of the Reservation located north of the Wind River, as well as the portion located east of the

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[6] The boundaries of the "Shoshone country" were described in Article IV of the First Treaty of Fort Bridger, concluded on July 2, 1863, 18 Stat. 685, 686. The First Treaty of Fort Bridger was one of several treaties concluded in 1863 between the United States and the various bands of Shoshone Indians. See *Northwestern Band of Shoshone Indians* v. *United States*, 324 U.S. 335 (1945).

Popo Agie River (art. I, 33 Stat. 1016).[7] The ceded lands, which amounted to approximately 1,480,000 acres (Pet. App. 10a), were to be disposed of "under the provisions of the homestead, town-site, coal and mineral land laws, or by sale for cash," and the United States agreed to pay to the Indians the proceeds derived from the sales of the lands (art. II, 33 Stat. 1016-1017). The United States, however, did not guarantee to find purchasers for the lands but, rather, agreed to "act as trustee for said Indians to dispose of said lands and to expend for said Indians and pay over to them the proceeds received from the sale thereof only as received, as herein provided" (art. IX, 33 Stat. 1018).

Article III of the 1904 Agreement provided that $85,000 of the sum derived from the sale of the subject lands would be devoted to making a per capita cash payment of $50 dollars to each Indian (33 Stat. 1017). Following this per capita payment, the remaining balance of the $85,000 sum "shall at once become available and shall be devoted to surveying, platting, making of maps, payment of the fees, and the performance of such acts as are required by the statutes of the State of Wyoming in securing water rights from said State for the irrigation of such lands as shall remain the property of said Indians, whether located within the territory intended to be ceded by this agreement or within the diminished reserve" (33 Stat. 1017).

By 1914, approximately 129,000 acres of the 1,480,000 acres covered by the 1904 Agreement (and 1905 Act) had been sold. See Pet. App. 412a. In 1915, however, the Sec-

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[7] The Indians had made two earlier cessions of lands included within the Wind River Indian Reservation as established by the 1868 Treaty. These were the "Lander Purchase" or "Brunot Agreement" executed on September 26, 1872, and ratified on December 15, 1874, 18 Stat. 291 (Pet. App. 409a), and the "Thermopolis Purchase" or "First McLaughlin Agreement" executed on April 21, 1896, and ratified on June 7, 1897 (30 Stat. 93 (Pet. App. 410a)).

retary of the Interior temporarily postponed further sale of the ceded lands, and from 1915 through 1934 only a few acres were sold. See *id.* at 412a-413a. In 1934, Congress enacted the Indian Reorganization Act, ch. 576, 48 Stat. 984, which, among other things, authorized the Secretary of the Interior to restore fully to permanent tribal ownership the remaining surplus lands of any Indian reservation previously opened to sale or other forms of disposal. See 25 U.S.C. 463(a). Later that same year, the Secretary temporarily withdrew from further disposition the remaining land ceded under the 1904 Agreement (Pet. App. 413a). Subsequently, under a series of restoration orders approved by Congress (*id.* at 731a-752a), all of the remaining undisposed lands ceded by the 1904 Agreement were fully restored to permanent tribal ownership. See *id.* at 413a. In addition, numerous parcels of land on the Reservation that had once passed into non-Indian ownership, either by sale under the 1905 Act or by purchase from Indian allottees, have been reacquired on behalf of the Tribes. See *id.* at 11a.

b. The special master issued his report and recommended final decree on December 15, 1982 (Pet. App. 367a-708a).[8] The special master found that the purpose of the 1868 Treaty was to establish a permanent homeland for the Indians and that this purpose included, but was not limited to, agricultural development of the reservation lands suitable for that purpose (Pet. App. 442a-443a, 643a). Applying the doctrine announced by this Court in *Winters* v. *United States,* 207 U.S. 564 (1908), the special

[8] We describe here only those rulings of the special master, the district court, and the state supreme court that are the most pertinent to the issues raised in the petition. The special master and state courts also entered various other rulings that are discussed in the cross-petition filed by the Tribes.

master found that "Congress, by ratification of the Treaty of 1868, impliedly created a reserved right for water on the Wind River Indian Reservation to satisfy the purposes of that Treaty" (Pet. App. 641a). The special master then determined that the reserved water rights created by the 1868 Treaty had not been terminated by the 1904 Agreement and that the Tribes continue to hold reserved water rights with an 1868 priority date for lands that were never sold pursuant to the 1904 Agreement (*id.* at 411a-420a, 638a-639a). He further ruled that the United States was not estopped from asserting federal reserved water rights on behalf of the Indians (*id.* at 623a-627a, 687a-688a).

The special master recommended the award of an 1868 priority date with regard to all tribal, allotted, or Indian fee land within the reservation that has never left Indian ownership or that had left Indian ownership but had been reacquired by the Tribes prior to the date of his report, provided that the lands were shown to be practicably irrigable (Pet. App. 424a-425a, 639a, 641a-642a). The special master also ruled that non-Indians who purchased land from Indian allottees did not acquire a share of the Indians' reserved water rights (*id.* at 425a-431a, 640a).

Turning to the task of quantifying the agricultural reserved water right, the special master ruled that the amount of water reserved for such purposes was that quantity required to irrigate those lands shown to be "practicably irrigable acres" (Pet. App. 534a). He defined "practicably irrigable acres" (in accordance with the use "agreed upon [in this case] by counsel for the State, the United States and the Tribes") as defined to mean "those acres susceptible to sustained irrigation at reasonable costs" (*ibid.*). Applying this standard, the special master first addressed and resolved issues regarding the Reservation's "historic acres"—lands that are now irrigated or that have been irrigated in the past (*id.* at 463a-531a, 643a-

672a). He then addressed and resolved matters concerning the Reservation's "future lands"—lands that have not been irrigated to date but that are claimed to be practicably irrigable (*id.* at 532a-591a, 672a-682a). In resolving the future lands issue, the special master accepted the testimony of the United States' witnesses that a "real" discount rate of four percent—which excludes the effects of present or expected inflation—should be used in determining whether the future lands can be feasibly irrigated (*id.* at 574a-580a, 680a). The special master ultimately recommended an award of 477,300 acre-feet per year for irrigation purposes.[9] The special master also recommended an award of additional reserved waters based on non-agricultural purposes (*id.* at 696a-702a).[10]

c. The district court accepted most of the recommendations of the special master (Pet. App. 121a-131a, 168a-279a). The district court concluded, however, that the primary purpose of the 1868 Treaty was to create an agricultural reservation, and it therefore rejected the special master's recommendations to confirm reserved

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[9] This figure was based on a recommended award of 288,355 acre-feet needed to irrigate 54,389 acres of Indian lands, including Indian-owned fee lands, that have historically been irrigated, plus an additional 188,937 acre-feet needed to irrigate 48,520 acres in "future projects" (Pet. App. 695a). The special master also recommended that the decree limit construction of any irrigation projects for the future lands to no more than ten percent of total awarded acreage for future projects in any given decade following 1982, unless sufficient replacement waters are made available through upstream storage facilities so as to allow non-Indian water users to continue to use the same amounts as they are presently using (*id.* at 580a-584a).

[10] The special master subsequently issued a Supplemental and Final Report (Pet. App. 280a-366a) addressing primarily the claims of non-Indians holding former allotted lands. The special master ruled that "non-Indians who purchase from Indians do not receive superior rights stemming from the treaty" (*id.* at 286a).

water rights for non-agricultural purposes (*id.* at 182a, 216a-222a, 262a-263a). The district court also rejected the special master's recommendation of an 1868 priority date for lands that had passed into non-Indian ownership and had since been reacquired. The court ruled that the priority date for such lands was to be the earliest of: 1) the date upon which the land left Indian ownership and was purchased by a non-Indian; 2) the date of the applicable state water permit; or 3) the date of first application of water to beneficial use (*id.* at 173a). The district court awarded a reserved right of 394,631 acre-feet annually with an 1868 priority date (*id.* at 169a-172a) and a reserved right totalling 84,800 acre-feet with varying priority dates (*id.* at 172a-182a). In addition, the district court initially adopted that part of the special master's recommendation that would condition the use of the portion of the 1868 reserved water right awarded with respect to the future lands upon the provision of storage facilities sufficient to provide replacement water to junior non-Indian water users (*id.* at 234a-237a, 267a). Upon reconsideration, however, the court held that the water right could be exercised in the absence of any storage facilities to provide replacement water (*id.* at 194a-198a, 200a-201a).

2. The Wyoming Supreme Court affirmed most of the rulings of the district court (Pet. App. 1a-119a). It found, however, that the district court had erred in adopting the special master's recommendation of a ten percent reduction in the Indians' "future projects" land base to provide a margin of error (*id.* at 56a-58a). The court also ruled that the non-Indian appellants who acquired lands from Indian allottees must be awarded a reserved water right having an 1868 priority date for any of those lands that they can show are practically irrigable and either were irrigated by their Indian predecessors or were put under irrigation within a reasonable time after the date upon which they passed from Indian ownership (*id.* at 75a). Finally, the

court agreed with the special master's finding of an 1868 priority date for the reserved water rights claimed for allotted lands that had passed into non-Indian ownership and that had subsequently been reacquired by the Tribes. Accordingly, the Wyoming Supreme Court reversed the district court's holding of a later priority date for such lands (*ibid.*).

ARGUMENT

The State of Wyoming initiated this action to obtain a quantification of the Indian Tribes' water rights in the Big Horn Basin. Now, after a decade of litigation, including review by that State's highest Court, Wyoming has obtained what it sought—a definitive resolution of the Tribes' entitlement. Here, as is usually the case in complex general stream adjudications, none of the parties has obtained everything that it sought. But the Wyoming Supreme Court's decision is fundamentally fair, and the particular portions of the opinion below that petitioner and the non-Indian cross-petitioners now challenge are correct and do not conflict with any decision of this Court. To the contrary, they are consistent with this Court's decisions concerning water rights claimed on behalf of Indian reservations. Nor has the Wyoming Supreme Court articulated legal principles in this case that conflict with those followed by other appellate courts in similar cases. Accordingly, the petition for a writ of certiorari—and a fortiori the Indian and non-Indian cross-petitions—should be denied.

1. This Court held in *Winters* v. *United States*, 207 U.S. 564 (1908), that when the United States reserves lands on behalf of an Indian tribe, the United States at the same time also impliedly reserves for the use of the Indians such previously unappropriated waters as are needed to fulfill the purposes of the reservation. As the Court has since explained: "*Winters* concluded that the Government, when it

created [the] Indian reservation, intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless." *Arizona* v. *California,* 373 U.S. 546, 600 (1963) (*Arizona I*). These *Winters* reserved water rights vested "as of the time the Indian Reservations were created." *Arizona I,* 373 U.S. at 600.

The language of the 1868 Treaty unambiguously indicates that one of the purposes of that treaty was to promote the establishment of agriculture on the Wind River Reservation. Furthermore, it is undisputed that the reserved lands require irrigation in order to produce crops (Pet. App. 26a). Thus, the special master, the district court, and the Wyoming Supreme Court all found, in accordance with the *Winters* doctrine, that the 1868 Treaty was intended to reserve water to carry out the agricultural purposes of the Reservation (*id.* at 26a-31a, 210a-222a, 431a-446a). Petitioner does not contend that the language of the Treaty itself or any documents or circumstances contemporaneous with its execution and ratification suggest a contrary result.[11] Rather, petitioner asserts (Pet. 12-18) that the "water proviso" to the 1905 Act somehow precludes the "judicial creation" of an implied reserved water right for the Reservation (Pet. 12), or, alternatively, that any reserved water rights created by the 1868 Treaty were subsequently extinguished by the water proviso to the 1905 Act.

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[11] Petitioner does suggest that the *Winters* doctrine has been undermined by *United States* v. *New Mexico,* 438 U.S. 696 (1978). Petitioner relies on a passage from that opinion that states (*id.* at 700):

> Each time this Court has applied the "implied-reservation-of-water doctrine," it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated.

Petitioner, taking the words "entirely defeated" out of their context, maintains (Pet. 15-16) that the agricultural purposes of the Wind

The Wyoming Supreme Court properly rejected these contentions (Pet. App. 28a-32a). The 1905 Act does not, of course, shed any direct light on the intent of the parties to the 1868 Treaty. And even if that legislation provided a basis for inferring the 1905 Congress's view of the 1868 Treaty, such inferences would carry limited weight. It is "well settled" that " 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " *Russello* v. *United States,* 464 U.S. 16, 26 (1983) (quoting *United States* v. *Price,* 361 U.S. 304, 313 (1960)).

The 1905 Act, in any event, provides no reasonable basis for inferring the 1905 Congress's views on whether the 1868 Treaty created a reserved water right. The water proviso, which appears in Article III of the 1905 Act (Pet. App. 778a-779a), merely states that the remaining balance of an $85,000 sum to be obtained from the sale of certain Indian lands shall, following a per capita distribution of $50 per Indian, "become available and shall be devoted to surveying, platting, making of maps, payment of the fees, and the performance of such acts as are required by the statutes of the State of Wyoming in securing water rights

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River Indian Reservation would not have been "entirely defeated" without a federal reserved water right because the Indians could have obtained water rights to a portion of their lands by securing the rights under state law. The possible availability of a state-law water right for some lands, however, is not an appropriate basis for rejecting a federal reserved right. Rather, as the extract from *New Mexico* quoted above clearly indicates, the appropriate test focuses upon whether water is needed in the physical sense to attain the purposes of the reservation. If so, then the courts will find an implied federal reserved water right effective as of the date the reservation was established. *Cappaert* v. *United States,* 426 U.S. 128, 138-139, 145 (1976). In this case, that date is 1868, long before Wyoming was admitted to the Union and therefore long before water rights could have been acquired pursuant to state law.

from said State for the irrigation of such lands as shall remain the property of said Indians * * * " (33 Stat. 1017). This proviso provides no concrete basis for inferring a congressional understanding that the 1868 Treaty—despite its explicit contemplation of agricultural development—failed to reserve the water necessary for that development. The proviso indicates, *at most,* some doubt whether—or to what extent—such reserved water rights existed. The 1905 Act, of course, predated this Court's 1908 *Winters* decision. Thus, the contours of the federal reserved rights doctrine, and the quantities of water that might be claimed under that doctrine, were then unresolved. Congress, responding to this uncertain state of the law, presumably elected to assist the Tribes in securing water rights in order to ensure that the Tribes would receive sufficient water for their land even if federal law did not already secure the necessary water rights. Petitioner's further inference that Congress's actions should be taken as an affirmative denial by Congress of the existence of a reserved water right is unwarranted.[12]

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[12] Petitioner is mistaken in suggesting (Pet. 12-13, 17) that Congress's rejection of proposals that would have expressly created a reserved right for the Wind River Reservation demonstrate that Congress wished to deny the Tribes such rights. The proposal to amend the 1905 Act to give the Indians a grace period in which to secure their own permits for allotments on the ceded portion of the Reservation (see H.R. Rep. 3700, 58th Cong., 3d Sess. 7-9 (1905)) does not indicate a congressional belief that there never was any prior intent to reserve water for the Indians. This proposal was rejected because it was feared that the statutory grace period would delay settlement of the opened area. See S. Rep. 4263, 58th Cong., 3d Sess. 2 (1905). As for the 1914 proposal, it was not enacted because it was introduced as an amendment to an appropriations bill and was ruled out of order. See Pet. App. 31a. In either instance, Congress's inaction is entitled to little weight in interpreting the 1868 Treaty. See, *e.g., Red Line Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381-382 n.11 (1969).

A fortiori, the water proviso of the 1905 Act cannot reasonably be read as impliedly terminating the reserved water rights conferred by the 1868 Treaty.[13] This Court has required that "Congress's intention to abrogate Indian treaty rights be clear and plain." *United States* v. *Dion,* 476 U.S. 734, 738 (1986). See also, *e.g., Solem* v. *Bartlett,* 465 U.S. 463, 472 (1984). Petitioner falls far short of meeting that standard. The water proviso of the 1905 Act, which was essentially an appropriations measure concerning the disposition of a part of the funds to be generated by the land sales contemplated in the 1904 Agreement, does not expressly or impliedly surrender any water rights for the unsold lands that the Tribes held prior to the enactment of that statute. Nor has petitioner advanced any legislative history or surrounding circumstances showing a clear congressional intent to diminish existing treaty water rights for lands remaining in Indian ownership.[14] Indeed, Article X of the 1904 Agreement stated that nothing in that Agreement would deprive the Indians "of any benefits to which they are entitled under existing treaties or agree-

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[13] We address here petitioner's argument (Pet. 15-18) that the water proviso terminated all of the 1868 Treaty reserved water rights, without distinction as to the lands made subject to disposition under that Act and the lands of the "diminished" Reservation. We deal below with petitioner's separate argument (Pet. 26-28) concerning the lands that were made subject to sale under the 1905 Act but that never passed into non-Indian ownership and were later restored to the Indians.

[14] Petitioner incorrectly asserts (Pet. 17) that "the Wyoming Supreme Court failed even to address the fact that Congress carefully considered and refused to enact a limited reserved water right for the Wind River Indian Reservation * * *." The Wyoming Supreme Court considered (Pet. App. 29a-31a) these congressional inactions (see n.12, *supra*) and determined that they do not reflect any intent concerning any water rights that were created by the 1868 Treaty. Consequently, the court concluded, those inactions failed to demonstrate that the 1905 Act terminated the Tribes' treaty water rights (Pet. App. 31a).

ments, not inconsistent with the provisions of this agreement" (Pet. App. 774a). Petitioner would read the 1904 Agreement as effecting a termination of all of the Tribes' treaty water rights, including those for lands that were not subject to disposition under the Agreement and for which no compensation whatsoever was to be provided. This Court should decline petitioner's invitation to construe the water proviso as a "backhanded way of abrogating the [treaty] rights of these Indians." *Menominee Tribe* v. *United States,* 391 U.S. 404, 412 (1968).[15]

2. Petitioner alternatively maintains (Pet. 26-28) that the Wyoming Supreme Court erred by confirming an 1868 priority date for the reserved water rights respecting lands that, although made subject to disposition under the 1905 Act, were never sold and were later restored to the Indians. Petitioner asserts that the 1904 Agreement effected an immediate relinquishment of the Indians' reserved water rights for all of those lands. The Wyoming Supreme Court correctly rejected that contention.

Article I of the 1904 Agreement provided that the Tribes agreed to "cede, grant, and relinquish to the United States, all right, title, and interest" in the subject lands (33 Stat. 1016). The ceded lands were to be disposed of "under the provisions of the homestead, town-site, coal and mineral land laws, or by sale for cash," and the United States

[15] If the parties to the 1904 Agreement had intended to effect a termination of the Indians' water rights, they were well aware of how to draft a provision reflecting such intent. The negotiator on behalf of the United States was the same Agent James McLaughlin who had negotiated the earlier "Thermopolis Purchase," concluded in 1897, by which the Indians had ceded approximately 55,000 acres of the Wind River Reservation to the United States. Unlike the 1904 Agreement, however, the Thermopolis Purchase Agreement provided not only for a cession of the subject lands, but also for cession of "the water rights appertaining thereunto * * * " (Pet. App. 410a). Those water rights, of course, could only have been federal reserved water rights.

agreed to pay to the Indians the proceeds derived from the sales of the lands (art. II, 33 Stat. 1016-1017). Article IX provided, however, that the United States did not guarantee to find purchasers for the lands but, rather, agreed to "act as trustee for said Indians to dispose of said lands and to expend for said Indians and pay over to them the proceeds received from the sale thereof only as received, as herein provided" (33 Stat. 1018).

Statutes ratifying agreements with Indians are to be construed in favor of the Indians. *Antoine* v. *Washington*, 420 U.S. 194, 199 (1975). Notably, the 1904 Agreement did not state, as did various other turn-of-the-century surplus lands acts, that the subject lands were being "conveyed" to the United States. See *Solem* v. *Bartlett*, 465 U.S. at 469 n.10. Rather, the United States was to hold the lands in trust for the Indians for the purpose of future sale. The Indians were not to receive a fixed amount in return for the lands; instead, they were to be compensated as the lands were sold. Indeed, the 1904 Agreement expressly declined to guarantee that purchasers for all of the lands would ever be found. Under these circumstances, the unsold lands were not restored to the public domain but, instead, always retained their status as Indian lands. See *Ash Sheep Co.* v. *United States*, 252 U.S. 159, 164-166 (1920); *United States* v. *Brindle*, 110 U.S. 688, 693 (1884). See also *Solem* v. *Bartlett*, 465 U.S. at 473; *Ute Indian Tribe* v. *State of Utah*, 773 F.2d 1087, 1090 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986). Because the Indians would receive no compensation for any given parcel as long as that tract remained unsold, and because there was no assurance that the subject lands would ever be sold, the 1905 Act can be read in the manner petitioner suggests only by assuming an implied intent to effect an immediate, uncompensated termination of treaty water rights for lands that still retained their Indian status and

that might retain that status indefinitely. Such an assumption would be contrary to the rule disfavoring the construction of statutes ratifying agreements with the Indians to their prejudice. It would be illogical as well. The unsold lands themselves never lost their status as lands reserved for the benefit of the Indians, and, accordingly, they continued to have a federal reserved water right as an inherent attribute of that status.[16]

3. This Court held in *Arizona I* that when Congress establishes an Indian reservation, the measure of water reserved for agricultural purposes is the amount sufficient "to irrigate all the practicably irrigable acreage on the reservation[ ]" (373 U.S. at 600-601). The Wyoming Supreme Court expressly applied that standard to quantify the amount of water reserved for the Wind River Indian Reservation (Pet. App. 47a). Petitioner now requests (Pet. 18-26) this Court to reconsider the practicably irrigable acreage (PIA) standard. That request should be denied.

Petitioner, after a decade of litigation, asserts that the PIA standard should be abandoned and the quantification process should begin anew using some other standard that would be determined by reference to the Indians' reasonable needs. This Court, however, expressly rejected peti-

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[16] Petitioner relies (Pet. 28) on *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977), which concerned the question whether a reservation had been disestablished for purposes of determining governmental jurisdiction over lands within the area in question. By contrast, the issue presented here is not whether the 1905 Act diminished the exterior boundaries of the Wind River Reservation for jurisdictional purposes, but rather a distinct question of property rights: whether that statute effected an immediate, implied termination of the Indians' reserved water rights for such lands. As the Indians' beneficial ownership of those lands continued up to the time of their sale, the Tribes' reserved water rights—which were one of the incidents of their beneficial ownership—likewise remained in effect pending disposition and continued uninterrupted for those lands that were never sold.

tioner's substitute methodology in *Arizona I*, stating (373 U.S. at 601):

> How many Indians there will be and what their future needs will be can only be guessed. We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage.

That reasoning is equally compelling here.[17]

Petitioner asserts that the continuing validity of the PIA standard has been called into question by this Court's subsequent opinions in such cases as *United States* v. *New Mexico*, 438 U.S. 696 (1978), and *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (*Fishing Vessel*). Similarly, the non-Indian cross-petitioners contend (88-553 Cross-Pet. 10-18) that the *New Mexico* decision created an "equitable device" (*id.* at 17), whereby a court must consider junior

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[17] Petitioner attempts to distinguish *Arizona I* on the ground (Pet. 19, 20, 23, n.25) that the reservations in question there had not been established for the use of any particular tribes specifically identified when those reservations were created. Nothing in this Court's *Arizona I* opinion, however, attributes any significance to that circumstance. The Court rejected a "future needs" standard in favor of the PIA standard because "[h]ow many Indians there will be and what their future needs will be can only be guessed" (373 U.S. at 601). The statement remains accurate even when only one Indian tribe is being considered. But even if petitioner's suggestion were meritorious as a matter of law, it would be unavailing here. Article II of the 1868 Treaty stated that the Wind River Indian Reservation was set aside for the use of the Shoshone and Bannock Tribes "and for such other friendly tribes or individual Indians as from to time they may be willing, with the consent of the United States, to admit amongst them." 15 Stat. 674. Hence, the 1868 Treaty contemplated the possible settlement of additional, unspecified tribes on the Reservation. Subsequently, the Arapaho Tribe was settled upon the Wind River Indian Reservation without the consent of the Shoshone Tribe. See page 4, *supra*.

non-Indian uses of the common water supply and, depending upon the particular facts, limit the exercise of the Indians' senior water rights in order "to protect [junior] state water users *after* the facts and law have been correctly applied" (Pet. App. 17a (emphasis in original)).

This Court has previously declined to reconsider the PIA standard in light of *New Mexico* and *Fishing Vessel*. *Arizona* v. *California*, 460 U.S. 605, 625-626 (1983) (*Arizona II*). In any event, petitioner's and cross-petitioners' reliance upon *New Mexico* and *Fishing Vessel* is misplaced. The question considered by this Court in *New Mexico* concerned the purposes for which water is reserved when lands are set aside for a national forest, and *Fishing Vessel* involved the allocation of fisheries where the Indians hold a treaty right to fish "in common with all citizens of the Territory." 443 U.S. at 659. Neither case concerned Indian water rights or addressed the PIA standard.

Furthermore, *New Mexico* does not, as the non-Indian cross-petitioners contend, furnish an "equitable device" for limiting the exercise of a federal reserved right once it has been determined such a right exists. Rather, *New Mexico* concerned only the issue of what circumstances are sufficient to give rise to a federal reserved water right in the first place. This Court stated (438 U.S. at 702):

> Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would ac-

quire water in the same manner as any other public or private appropriator.

The *New Mexico* decision does not announce any equitable limitations on the recognition of a federal reserved water right. The decision simply holds that *implication* of a federally reserved water right to fulfill a reservation's secondary purposes would be inconsistent with Congress's policy of deferring to state water law. Indeed, this Court has expressly declined to adopt an "equitable balancing" approach in cases involving federal reserved water rights. The State of Nevada contended in *Cappaert* v. *United States, supra,* that this Court's decisions involving federal reserved water rights established "an equitable doctrine calling for a balancing of competing interests" (426 U.S. at 138). This Court, however, rejected that contention, noting that "an examination of those cases shows they do not analyze the doctrine in terms of a balancing test" (*ibid.*).[18] Cross-petitioners' contention here that the exercise of a federal reserved water right must be limited so as "equitably" to accommodate the demands of competing junior water users is indistinguishable in principle from the equitable balancing argument that this Court rejected in *Cappaert.*[19]

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[18] This Court further stated (426 U.S. at 139 n.4):

> Nevada is asking, in effect, that the Court overrule *Arizona* v. *California,* 373 U.S. 546 (1963), and *United States* v. *District Court for Eagle County,* 401 U.S. 520 (1971), to the extent that they hold that the implied-reservation doctrine applies to all federal enclaves since in so holding those cases did not balance the "competing equities." • • • However, since balancing the equities is not the test, those cases need not be disturbed.

[19] Moreover, the Wyoming Supreme Court demonstrated a "sensitivity" (88-553 Cross-Pet. 13) to the interests of other water users, stating (Pet. App. 72a):

> In the case at bar, the purpose of the reservation for which water is reserved is narrow—agricultural only. The right was

In sum, petitioner and the non-Indian cross-petitioners have shown no adequate reason for now reconsidering the PIA standard.[20] As this Court observed in *Arizona I*, the PIA standard is particularly well suited to quantification of the reserved water rights for the agricultural purposes of Indian reservations. It offers a comparatively objective means of quantifying such rights, whereas any standard based upon "foreseeable needs" would necessarily involve a high measure of subjective judgment. Here, as in *Arizona II*, reconsideration of the PIA standard would open a "Pandora's Box" (460 U.S. at 625) and inject grave uncertainty into Indian water rights litigation.[21]

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quantified based on PIA—the master and the [district] court rejecting some 50,000 acres originally claimed by the United States and the Tribes. The Indians' claim was further reduced by requiring an efficiency increase in historic lands. All of this evidences a sufficient sensitivity to the water needs of other water users.

[20] Petitioner maintains (Pet. 23-26) that the Wyoming Supreme Court's use of the PIA standard conflicts with the decisions in *United States* v. *Walker River Irr. Dist.*, 104 F.2d 334, 339-340 (9th Cir. 1939), in which the court applied a "needs" standard, and *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321, 337 (9th Cir. 1956), cert. denied, 352 U.S. 988 (1957), in which the court found an implied reservation of such waters as were "required to provide for the reasonable needs of the Indians * * *." Both of those Ninth Circuit decisions, however, preceded this Court's decision in *Arizona I*. Thus, to the extent that they deviate from the PIA standard, they have no continuing precedential value, and in fact the Ninth Circuit has applied the PIA standard since *Arizona I* was decided. See, *e.g.*, *United States* v. *Adair*, 723 F.2d 1394, 1415-1416 (9th Cir 1983), cert. denied, 467 U.S. 1252 (1984).

[21] Petitioner's contention (Pet. 23-26) that the application of the PIA standard in this case resulted in a grossly excessive award is meritless. The Tribes relinquished their claims to vast aboriginal lands in exchange for the Wind River Reservation. The 1868 Treaty that effected this exchange recognized that the Tribes faced substantial cultural obstacles in developing an agricultural economy and that the

4. The non-Indian cross-petitioners contend (88-553 Cross-Pet. 19-22) that the Wyoming courts were obligated to use the discount rate established by the Water Resources Council (WRC) pursuant to Section 80(a) of the Water Resources Development Act of 1974 (WRDA), 42 U.S.C. 1962d-17(a), in considering whether lands on the Reservation can be feasibly irrigated in the future.

The choice of an appropriate discount rate is one step in determining whether acreage is "susceptible to sustained irrigation at reasonable costs" (Pet. App. 47a). The Wyoming Supreme Court correctly held that the special master's choice of a 4% discount was consistent with the expert testimony on the subject (Pet. App. 53a-54a). It is clear from the WRDA's plain terms that the Wyoming courts were not required as a matter of law to disregard their own assessment of the evidence and instead to employ the WRC discount-rate formula in quantifying Indian water rights. Section 80(a) states that the interest-rate formula established pursuant to that provision is to be

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Tribes' conversion from a nomadic to an agrarian existence would take time. Petitioner's contention that the Tribes should now be restricted to their "historic" water usage—and prevented from realizing further development of their practicably irrigable lands—is neither consistent with the Treaty nor fair. Indeed, given the special master's finding that "[t]he history of the Reservation consistently shows a level of unemployment far in excess of the rest of Wyoming" (Pet. App. 569a), it would appear that the Tribes have a compelling need to develop the agricultural potential of the Reservation. Thus, even if petitioner were correct that a court should attempt to calculate a reserved water right on the basis of its assessment of the Indians' "needs"—unanchored in any determination of the amount of irrigable land that Congress set aside for their benefit—there is no reason to believe that the quantification of the reserved water right in this case would be different. This case accordingly would not present a suitable occasion to revisit the PIA issue even if the Court were otherwise disposed to do so.

used "in plan formulation for discounting future benefits and computing costs by Federal officers, employees, departments, agencies, and instrumentalities in the preparation of comprehensive regional or river basin plans and the formulation and evaluation of Federal water and related land resources projects" (42 U.S.C. 1962d-17(a)). The WRDA requires federal agencies to use the WRC discount rate when making their feasibility studies concerning federal water-related projects. Such federal feasibility studies are specialized undertakings that often include a wide variety of public costs and benefits, such as flood control, effects on navigation, fish and wildlife, indirect economic benefits, and the like. They therefore may differ widely from other types of feasibility determinations, such as the one conducted here concerning the Tribes' future lands. The WRC interest rate was adopted for federal water project cost-benefit analysis only and is not necessarily appropriate for other purposes.[22]

5. Petitioner and the non-Indian cross-petitioners also object (Pet. 28-29; 88-553 Cross-Pet. 22-24) to the Wyoming Supreme Court's resolution of issues concerning the recognition of water rights when Indian lands pass into non-Indian ownership, as well as the recognition of water rights for such lands when they are reacquired by the Tribes. The Wyoming Supreme Court discussed these issues in a relatively brief portion (Pet. App. 72a-75a) of

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[22] The non-Indian cross-petitioners are mistaken in urging (88-553 Cross-Pet. 22 n.27) that the Wyoming Supreme Court's decision conflicts with the Tenth Circuit's decision in *Johnston* v. *Davis*, 698 F.2d 1088 (1983). *Johnston* holds only that a federal agency may use the WRC discount rate when preparing an environmental impact statement pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* It yields no suggestion that a state court must use the WRC discount rate when quantifying an Indian tribe's reserved water rights.

its lengthy opinion, and, contrary to the contention of petitioner and the non-Indian cross-petitioners, it did not articulate any principles of law that conflict with those expressed by the Ninth Circuit in *Colville Confederated Tribes* v. *Walton*, 647 F.2d 42, cert. denied, 454 U.S. 1092 (1981), and *United States* v. *Anderson*, 736 F.2d 1358 (1984). These issues therefore do not warrant review.

In *Walton*, the Ninth Circuit held that the non-Indian successor to an allottee takes title to the allottee's proportionate share of the reserved right, provided that the allottee had put the water to use or that the non-Indian purchaser does so within a reasonable time (647 F.2d at 51). Any such water right, moreover, must be maintained by continued use and not lost by non-use (*ibid.*). The Wyoming Supreme Court discussed *Walton*, with approval, in that portion of its opinion dealing with the water rights of the individual non-Indian appellants who are successors to Indian allottees (Pet. App. 72a-75a), stating that "[o]n remand, appellants [non-Indian successors] must be awarded a reserved water right with an 1868 priority date for the PIA they can show were irrigated by their Indian predecessors or put under irrigation within a reasonable time thereafter" (Pet. App. 75a). The court, however, did not expressly state, as did the Ninth Circuit in *Walton*, that any such rights must be continually maintained in order to protect them from loss through non-use. Unlike the non-Indian cross-petitioners (88-553 Cross-Pet. 24), however, we do not read the Wyoming Supreme Court's failure expressly to spell out the consequences of non-use as creating a conflict with *Walton*. The Wyoming Supreme Court did not state that *Walton* rights held by non-Indians cannot be lost through non-use. Rather, the court simply failed to address that subject one way or the other, perhaps because further proceedings are contemplated on

the rights of non-Indians who claim *Walton* rights (Pet. App. 75a). Hence, the opinion of the Wyoming Supreme Court cannot reasonably be read as adopting the principle that *Walton* rights, once established, may not be lost through non-use.

In *Anderson*, the Ninth Circuit further held that if a tribe reacquires formerly allotted lands, the "*Winters* rights appurtenant to allotted lands conveyed to a non-Indian purchaser will pass with title upon reacquisition by the Tribe and will retain their original priority date" (736 F.2d at 1362). The Wyoming Supreme Court's opinion in this case contains nothing indicating that it disagreed with the Ninth Circuit's discussion in *Anderson* of the appropriate principles to be applied when an Indian tribe reacquires allotted lands. The Wyoming Supreme Court simply stated, after discussing the rights of the *non*-Indian purchasers of allotted lands (Pet. App. 72a-75a), that when such lands are reacquired by the Tribe, there "is no reason then to deny the same priority to an Indian or tribal purchaser" (Pet. App. 75a). Petitioner objects (Pet. 29) that the court did not expressly state that there must be a showing that the reserved right was not lost through non-use by the intervening non-Indian owner. However, the court made clear that the tribal purchaser succeeds to the "same priority" as a non-Indian purchaser, and it therefore presumably would agree with the position of *Anderson*—and of petitioner herein—that the Tribe does not obtain a reserved right to reacquired lands if the reserved right has already been lost by the intervening non-Indian owner. The court's failure to address this issue explicitly may be due to petitioner's failure to make a showing of such a loss by non-use with respect to particular parcels of reacquired allotted lands.

Finally, the Ninth Circuit held in *Anderson* that, as to former Indian lands that were disposed of to non-Indians under a surplus lands act (rather than by Indian allottees)

and were later reacquired on behalf of the Indians, the tribe obtains a water right with a priority date as of the time the non-Indian obtained a water right, if any (736 F.2d at 1363). If no such state-law water right existed upon the date of reacquisition, then the tribe obtains a reserved water right with a priority date as of the date of reacquisition (*ibid.*). In this case, the Wyoming Supreme Court did not separately address the existence of water rights for those reacquired lands that originally were disposed of to non-Indians under the 1905 Act, rather than by individual allottees. The court's silence may be attributable to the fact that petitioner itself failed to urge that those lands should be treated differently and to lay a proper foundation for such an argument in the course of this litigation. Indeed, although the United States brought this aspect of *Anderson* to the attention of the Wyoming Supreme Court, petitioner urged that Court to disregard *Anderson* and to deny a reserved water right to *all* reacquired lands, whether they were originally alienated by individual allottees or pursuant to the 1905 Act. See generally Brief of Appellee State of Wyoming in Response to the Appellant's Brief of the United States and Tribes (Type 1 Claims), at 151-185. Against this background, the Wyoming Supreme Court's failure to address the 1905-Act lands separately is understandable.[23] In any event, the Wyoming Supreme Court's *silence* with respect to lands disposed of under a surplus lands act does not create a conflict with the Ninth Circuit's discussion of that subject in *Anderson*.[24]

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[23] Petitioner did rely on this distinction in its brief in support of its petition for rehearing (at 46-50) in the Wyoming Supreme Court, but the court denied that petition without comment (Pet. App. 122a). The state court's failure to address that issue at petitioner's behest for the first time on rehearing does not raise an issue for this Court's consideration.

[24] The district court, which—contrary to the Ninth Circuit's holdings in *Walton* and *Anderson*—ruled (Pet. App. 224a-225a) that

6. The non-Indian cross-petitioners also assert (88-553 Cross-Pet. 24-30) that the United States should be equitably estopped from asserting reserved water rights on behalf of the Tribes because the United States induced non-Indians to settle in the area knowing that the land could be profitably farmed only by irrigation, which, in turn, necessitated secure water supplies. The Wyoming Supreme Court correctly rejected that argument (Pet. App. 22a-23a).

The United States would not be estopped here even under the rules generally applicable in cases involving wholly private parties. Equitable estoppel requires, as an indispensable element, a misrepresentation by the party against whom the estoppel is invoked. See *Heckler* v. *Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 59 (1984). There is no showing here that the United States ever represented that there would be sufficient water to irrigate lands patented to non-Indian settlers under the general public land laws. It is well established that a federal patent does not carry with it any right to the use of water; rather, an entryman must look elsewhere to perfect a water right. *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 158-164

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an Indian allottee's non-Indian successor could not acquire a share of the reserved water right, did identify parcels that had passed into non-Indian ownership and that were subsequently reacquired on behalf of the Tribes (Pet. App. 173a-182a). The district court, however, did not differentiate between former allotted lands and former surplus-land-act lands. Notably, however, even under the district court's holding, the great majority of the water rights associated with the reacquired lands would be awarded early priority dates, typically before 1920. Petitioner has not asserted that the difference between such priority dates, as awarded by the district court, and the 1868 priority date awarded by the Wyoming Supreme Court, will, as a practical matter, have significant adverse effects upon water rights claimed by other parties.

(1935). Hence, the United States does not, by making lands available under the public land laws, represent that sufficient water will be available to make the lands productive. Nor is there any showing here that the United States ever represented that it would not claim reserved water rights on behalf of the Tribes. In fact, the district court specifically held that there is "no evidence in the record to support a finding of affirmative misconduct by the Federal Government" (June 8, 1984, Order at 13). The lack of any misrepresentation concerning water rights is, alone, fatal to any equitable estoppel argument.

7. The Shoshone Tribe and the Northern Arapaho Tribe of the Wind River Indian Reservation have filed a conditional cross-petition requesting that, if the Court grants Wyoming's petition for a writ of certiorari, the Court also address six additional issues that the Wyoming Supreme Court decided against the Tribes. See 88-492 Cross-Pet. i-ii. In our view, this Court should not undertake review of Wyoming's claims of error in this complex water rights dispute without also considering those issues raised by the Tribes that are closely related. We therefore submit that if the Court grants Wyoming's petition, the Court should have before it the Tribes' issues as well. Cf. *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983).

CONCLUSION

The petition and cross-petitions for a writ of certiorari should be denied.

Respectfully submitted.

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Nos. 88-309 and 88-553

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE STATE OF WYOMING
Petitioner,
v.

UNITED STATES OF AMERICA,
SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE
OF THE WIND RIVER INDIAN RESERVATION, *et al.*,
Respondents.

CITY OF RIVERTON, WYOMING, *et al.*,
Cross-Petitioners,
v.

UNITED STATES OF AMERICA,
SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE
OF THE WIND RIVER INDIAN RESERVATION, *et al.*,
Cross-Respondents.

On Petition and Cross-Petition for a Writ of Certiorari to the Supreme Court of Wyoming

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JOINT MEMORANDUM OF STATE OF WYOMING AND CITY OF RIVERTON, ET AL., IN REPLY TO OPPOSITION BRIEFS OF THE SHOSHONE AND ARAPAHO TRIBES AND THE UNITED STATES OF AMERICA

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In this reply memorandum, the petitioner, State of Wyoming, Case No. 88-309, and the cross-petitioner, City of Riverton, *et al.*,[1] Case No. 88-553, address certain aspects of the opposition briefs submitted herein by the respondent United States and cross-petitioner Tribes.[2] In addition to raising new arguments concerning the allocation of the burden of proof, the United States and Tribes rely on evidence which is not in the record below and ignore or misstate that record.

I. THE TRIBES AND THE UNITED STATES RAISE NEW ARGUMENTS CONCERNING THE EXISTENCE OF A FEDERAL RESERVED WATER RIGHT IN LIGHT OF CONGRESSIONAL DEFERENCE TO STATE LAW FOR THE ACQUISITION OF WATER RIGHTS FOR THE WIND RIVER INDIAN RESERVATION

The United States' and Tribes' response to Wyoming's Petition as it concerns the intent issue seems to forget that the issue before this Court is whether or not to grant *certiorari* review. Indeed, the very number of substantive arguments set forth by the United States and Tribes on the issue, which go far beyond *certiorari* practice and Wyoming's Petition, strongly suggests that a decision of this Court is needed to resolve those issues on the merits.

a. *Creation of the Federal Reserved Water Right.* Both the United States and the Tribes argue that it is not this, nor any court's, business to look past the circumstances surrounding establishment of a federal reservation to determine whether a federal reserved water

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[1] The cross-petitioners in Case No. 88-553 are as set forth in note 1 of the cross-petition therein. They are collectively referred to herein as "Riverton."

[2] Brief in Opposition for Respondents and Cross-Respondents Shoshone and Northern Arapaho Tribes, Nos. 88-309 and 88-553, November 21, 1988, hereinafter "Tribes' Opposition Brief" and Brief for the United States in Opposition, Nos. 88-309, 88-492, and 88-553, November, 1988, hereinafter "United States' Opposition Brief."

right was created to serve its purpose. United States' Opposition Brief, at 9-11; Tribes' Opposition Brief, at 16-18. Each argues that it is sufficient to imply the existence of a reserved water right if the Reservation needs water to achieve its purposes, without further examination of how Congress may have *intended* for water to be supplied. Such "bootstrapping" is, however, precluded by the decisions of this Court which demand a full examination of the intent of Congress to determine "what quantity of water, if any," it may impliedly have reserved. *United States v. New Mexico*, 438 U.S. 696, 698 (1978). *See also Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546 (1963). Thus, the issue before this Court is not only whether water would be necessary to achieve the Reservation's purpose, but whether Congress expressly intended such water to be secured under the law of Wyoming.

b. *Chronological Perspective.* The Tribes suggest that relying upon the 1905 Act to discern Congress' intent regarding the water rights of the Reservation, lacks "chronological perspective." Tribes' Opposition Brief, at 19. Even leaving aside comment on the strange position that the one statute which deals specifically with acquiring water rights for the Reservation is irrelevant to judge how water rights for the Reservation were to be obtained, the Tribes' argument lacks merit. The use of later Congressional actions to determine prior Congressional intent in the reserved right context has been relied upon by this Court as recently as *United States v. New Mexico*, 438 U.S. at 702-703. The same approach formed one basis of the Ninth Circuit Court of Appeals' analysis in *Skeem v. United States*, 273 F. 93, 95 (9th Cir. 1921).

In any event, it is the Tribes, in seeking to preclude a discussion of the intent issue, who disregard the historical facts regarding water use on the Reservation. As early as 1876, the Wyoming territorial legislature had codified the right of riparian land owners to use adjoin-

ing waters.[3] Only later, near the turn of the century, after the appropriation doctrine had been established in Wyoming, was desperation over the need to protect the Tribes' water rights from competing appropriations voiced by federal officials.[4] The 1905 Act was Congress' direct response to this concern to assure that the Tribes' water needs would not be imperiled by virtue of competing non-Indian appropriations. It is curious, speaking in 1988, that the Tribes and the United States allege that actions taking place in 1905 lack "chronological perspective" to a complete understanding of this case.

c. *The Purpose of "Securing" Water Rights.* Without any support in the record, both the Tribes and the United States suggest that the purpose of the 1905 Act was merely to "secure" Wyoming water rights to be obtained for the Reservation in the event that reserved water rights did not exist.[5] This rationalization is without foundation. First, the 1905 Act does not, as the Tribes and United States suggest, speak of "securing" water rights in the abstract. The plain language of Article 3 states that the funds devoted to water right acquisition "shall at once become available and shall be devoted to survey,

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[3] Wyo. Comp. Laws, Ch. 65, § 1 (1876). The United States ignores this law in arguing that no means of establishing Tribal water rights existed at the time the Reservation was created. United States' Opposition Brief, note 11.

[4] *See,* for example, Wyo. Exh. WRIR I&P 40, 43, and 49. The Tribes are incorrect when they suggest that a thorough review of the Reservation's history was made below. Like the Tribes, the lower courts ignored the evidence, dismissing it as "lacking perspective." Wyo. App. II, at 437a.

[5] Tribes' Opposition Brief, at 21; United States' Opposition Brief, at page 11. The Tribes cite the testimony of Dr. Iverson in support of their contention regarding the purpose of the 1905 Act. Tribes' Opposition Brief, at 20. Dr. Iverson testified, however, that it was not within the scope of his work to investigate water rights issues presented by the 1905 Act. Tr. at 119, 251-254, April 6, 1980.

platting, making of maps, payment of the fees, and the performance of such acts as are required by the statutes of the State of Wyoming *in securing water rights from such state* for the irrigation of such lands as shall remain the property of the Indians. . ." (emphasis added). From the very words of the statute, it is apparent that "securing" water rights from Wyoming simply means "obtaining" such rights, nothing more. Second, the legislative history of the 1905 Act reveals that Congress rejected an attempt to create a limited reserved water right for the Reservation.[6] The United States argues that Congress rejected this proposal simply to avoid delay in the opening of the Reservation. United States' Opposition Brief, note 12. Can it logically be said that a Congress concerned about delaying the opening of the Reservation by the limited withdrawal of Reservation waters from appropriation would have agreed to the vast reserved water right now claimed by the United States and Tribes? Third, the contemporaneous administration of the 1905 Act reveals that permits to irrigate nearly 150,000 acres on the Reservation were obtained. There was no suggestion at any time prior to the 1905 Act, or between 1905 and 1908, the year of the *Winter's* announcement, that

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[6] The Tribes assert that Congress could not have meant to fulfill its treaty obligations to the Tribes by causing an expenditure of the Tribes' "own proceeds." Tribes' Opposition Brief, note 21. In fact, in the negotiations which resulted in the agreement which the 1905 Act confirmed, it was the *Tribal spokesman* who asked that as much money as possible be set aside to secure water rights for the Reservation. Wyo. Exh. WRIR I&P 8, at 19. Furthermore, the 1905 Act also earmarked an additional $150,000 of the sale proceeds to construct irrigation facilities, an additional $50,000 for the purchase of livestock, an additional $50,000 for a school fund, and all remaining sale proceeds to a general welfare fund. *See* Articles 4, 5, 6, and 7. In making the assertion they do, the Tribes also forget that Congress appropriated over $2,000,000 in the years after 1905 to construct irrigation facilities on the Reservation. Those appropriations were unrelated to the sale proceeds obtained under the 1905 Act.

water rights for the Reservation were to be obtained other than under Wyoming law. The Tribes and United States persist in reading *Winters* as somehow overturning the 1905 Act, rather than recognizing the Act as an express Congressional alternative to the implication of a reserved water right. Finally, the Tribes and United States conveniently ignore the fact that, by 1905, Congress had expressly created reserved water rights on behalf of the Fort Hall, Crow, and Mission Indian Reservations.[7] Within one year of the 1905 Act, Congress again created an express reserved water right, for the Yakima Reservation in Washington.[8] Congress was, indeed, adept at "securing" the federal reserved water rights of Indian reservations by express legislation in 1905. The 1905 Act reveals that it was equally adept at employing state law to the task.

d. *Gallon-for-Gallon Reduction.* It is also dangerously misleading to suggest, as have the Tribes, at Footnote 7 and the accompanying text of their opposition brief, that enforcement of the reserved water right on the Reservation will result in "virtually no water loss to non-Indian irrigators." The fact is that this summer, state water users were damaged by exercise of reserved water rights of an amount far less than the reserved water right awards for "historic" lands by the decree below. Those rights did *not* include the use of one drop of the approximately 210,000 acre-feet of water awarded for "future projects." As the master below found, absent storage, water for the future projects will come from the ditches and reservoirs of Wyoming users.[9]

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[7] *See*, respectively, Act of June 6, 1900, Article VIII, 31 Stat. 672; Act of April 27, 1904, Article V, 33 Stat. 352; Mission Indian Relief Act of 1891, 26 Stat. 712.

[8] Act of March 6, 1906, § 5, 34 Stat. 53.

[9] Wyo. App. H, pp. 629a, 630a, 688a-690a. These findings remain entirely undisturbed.

e. *The Decisions in United States v. Parkins*[10] *and United States v. Hampleman.*[11] Finally, the Tribes and the United States argue that the issue of whether a federal reserved water right exists on behalf of the Reservation has been settled by *United States v. Parkins* and *United States v. Hampleman.* The Wyoming Supreme Court, however, rejected the interpretations of the cases offered by the Tribes. This is unsurprising since *United States v. Parkins* was a lawsuit by the United States to enjoin Parkins from diverting on the Reservation to the detriment of the United States' *appropriative* water rights under Wyoming law. No reserved right was at issue. The United States District Court enjoined Parkins' diversions on four bases, only one of which addressed the topic of federal reserved water rights and which, in doing so, merely assumed that such existed on behalf of the Reservation. *United States v. Parkins*, 18 F.2d 642 at 643. For its part, the *Hampleman* decree does not even allude to the issue of reserved water rights for the Reservation.[12] It is a decision concerning regulatory jurisdiction only. In any event, if the United States is prepared to argue that these cases settle the issue of reserved water rights on the Reservation, they must also be bound, as a matter of *res judicata*, by the absence of any claim or decree in either recognizing reserved water rights for any purpose other than to serve the agricultural purpose of the Reservation.

II. THE TRIBES RELY ON EVIDENCE NOT IN THE RECORD CONCERNING THE RESERVATION'S "NEEDS" FOR WATER

The Tribes represent that the reserved water right is for water which "is desperately needed to improve the

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[10] 18 F.2d 642 (D. Wyo. 1926).

[11] Case No. 753 (D. Wyo. June 26, 1916).

[12] Wyo. Exh. WRIR I&P 34.

economy on the Reservation." [13] There is absolutely no evidence, let alone a finding by the trial court below, that this is true. The Tribes' argument seems to be that, as a matter of law, every Indian reservation has a desperate need for all the water which can be used for the irrigation of any practicably irrigable land on the reservation. Nevertheless, the Tribes point to no decision of this or any other court which so holds. Each decision relied upon by the Tribes is addressed to the specific fact situation confronted by the court rendering that decision. The Tribes fail to demonstrate that the instant fact situation is indistinguishable from those involved in the cited decisions.

III. THE TRIBES RAISE NEW ARGUMENTS CONCERNING THE ALLOCATION OF THE BURDEN OF PROOF WITH RESPECT TO THE APPROPRIATE STANDARD OF QUANTIFICATION OF THE RESERVED RIGHT AND THE PRIORITY DATE FOR REACQUIRED LANDS

The Tribes assert that the State of Wyoming failed to establish the amount of water which should have been awarded under the "minimal needs" or "moderate living" standards for the quantification of the reserved water right.[14] Similarly, the Tribes suggest that the State should have put on evidence as to whether reserved water rights on reacquired lands had "been lost through nonuse." [15] In both instances the Tribes fail to understand that evidence in support of the Tribes' claims must be adduced by the Tribes themselves or the United States.

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[13] Tribes' Opposition Brief, note 37.

[14] "[T]he State never proffered any evidence at all to support the assertion that the amount of reserved water quantified under the PIA standard exceeded the 'minimal needs' or 'moderate living' requirements of the Indians." Tribes' Opposition Brief, at note 37.

[15] *Id.*, at page 38.

Throughout the adjudication below, the State consistently asserted that "minimal needs" or "moderate living" was the appropriate standard for the quantification of the reserved water right. The Tribes now suggest that, having done so, the State was obliged to put on evidence in support of those rights.[16] Having elected to ignore the appropriate standard, the Tribes cannot now complain that no one else proved up their reserved water right. In the same vein, the Tribes seem far off the mark in arguing that someone else should have proved that their reserved water right had or had not been continuously used on reacquired lands.

IV. THE TRIBES IGNORE THE EVIDENCE OF RECORD WHICH CONCLUSIVELY DEMONSTRATES THAT THE SOURCE OF FUNDING FOR THEIR "FUTURE PROJECT" WILL BE FROM THE FEDERAL GOVERNMENT

The Tribes categorize as "sheer speculation" the argument by Riverton that future irrigation projects would be implemented "only by obtaining federal funds."[17] Perhaps the same could be said of the entirety of the Tribes' "future" claims which were supported by the testimony of the very same witness, called by the Tribes, who testified, "the source of the money is the Federal Government . . . ." Tr. at 5078. For the Tribes now to argue that the appropriate discount rate is other than that prescribed by federal statute is to turn a blind eye to their own evidence.

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[16] In fact, the State consistently asserted that the evidence of seventy-five years of intensive historic irrigation on the Reservation established the level of "minimal needs." Wyoming's Amended Proposed Master's Report, May 5, 1982, Vol. III, p. 1.

[17] Tribes' Opposition Brief, at page 43.

V. THE UNITED STATES MISINTERPRETS THE RECORD BELOW IN SUGGESTING THAT THE STATE DID NOT TIMELY RAISE THE *ANDERSON* ISSUES

The United States argues that the conflict concerning priority dates between the decisions of the Wyoming Supreme Court herein and that of the Ninth Circuit in *Anderson*,[18] was the result of the failure of the State to raise the issue below.[19] This misstatement is undoubtedly due to the Solicitor's understandable unfamiliarity with the extensive record. The State consistently asserted before the master,[20] the trial court [21] and the Wyoming Supreme Court [22] that the priority date for water rights associated with reacquired homesteaded lands should be no earlier than the date of reacquisition or the date established under state law.[23]

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[18] *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984).

[19] United States' Opposition Brief, at page 22.

[20] Wyoming's Amended Proposed Master's Report, May 5, 1982, Vol. V, pp. 166-67.

[21] Wyoming's Brief in Support of Motion for Action upon the Special Master's Report on Indian Reserved Rights Claims, March 18, 1983, p. 60, note 184.

[22] Brief of Appellant State of Wyoming (Type I Claims), December 2, 1985, pp. 132-133.

[23] Obviously, since *Anderson* was not decided until 1984, after the trial court decision, the Ninth Circuit's opinion was not cited by name except to the Wyoming Supreme Court.

CONCLUSION

In light of the inability of the Tribes and the United States to face the issues presented in the State's petition and Riverton's cross-petition without misstating the record below, the need for review of the decision below is indisputable.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

BRIEF OF THE STATES OF MONTANA, NEW MEXICO, NEVADA, NORTH DAKOTA, SOUTH DAKOTA AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a reserved water right impliedly exist for an Indian reservation where Congress provided that state water rights be obtained for the reservation?

2. Assuming, *arguendo*, that implied reserved water rights exist for such a reservation, may a reserved water right be implied for all practicably irrigable acres within the reservation in the presence of substantial state water rights in use on the reservation, obtained pursuant to Congressional directive, and in the absence of any demonstrated necessity for additional water to fulfill reservation purposes?

3. Again assuming, *arguendo*, that implied reserved water rights exist for such a reservation, what priority date should be accorded a reserved water right for practicably irrigable lands which were ceded by the reservation's tribes and became part of the public domain when such lands are later restored to and made part of the reservation by the United States or reacquired by the Indians from non-Indians?

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BRIEF OF THE STATES OF MONTANA, NEW MEXICO, NEVADA, NORTH DAKOTA, SOUTH DAKOTA AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The amici curiae states named herein respectfully request that Wyoming's petition for a writ of certiorari to review the judgment of the Wyoming Supreme Court entered on February 24, 1988, be granted.

INTEREST OF AMICI

The western states named herein as amici curiae have intricate systems for determining and administering water rights. By and large, these systems are based on the doctrine of prior appropriation. Under this doctrine the states have established legal frameworks within which property rights to use water are created by allowing

holders of vested water rights to exercise exclusive control over a certain amount of water. The reliability and predictability of the water rights established under the appropriation doctrine have allowed the West to develop and become inhabited, notwithstanding its aridity.

In promoting the settlement and reclamation of the West, the federal government has relied heavily upon state created judicial and administrative procedures. This has been especially true with respect to western water law. This Court has repeatedly reaffirmed that development and management of western water resources must occur in conformity with state water law. *California v. United States*, 438 U.S. 645 (1978); *United States v. New Mexico*, 438 U.S. 696 (1979). One exception to this purposeful and longstanding rule of deference is the doctrine of federal reserved water rights.

The doctrine of implied reserved federal water rights is a judicial doctrine which dates back to the turn of the century. Prior to its creation Congress had, through homesteading and mining laws, encouraged settlement of the West based on a system where water rights could only be obtained under state law, or local territorial law. *See e.g.*, Mining Act of 1866, 14 Stat. 253, 43 U.S.C. §661; Desert Land Act of 1877, 19 Stat. 377, 43 U.S.C. §322; *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935). Appropriative water rights so established were, as this Court noted, "rights which the [federal] government had, by its conduct, recognized and encouraged and was bound to protect." *Broder v. Natoma Water and Mineral Co.*, 101 U.S. 274, 276 (1879). Congress also, in dealing with Indian tribes, established many Indian reservations in the western United States. However, with few exceptions, Congress did not address the question of water rights for such reservations. In 1908, this Court held that, notwithstanding lack of treaty provisions specifically dealing with water, Congress must have im-

pliedly reserved water from the Milk River when it set aside land for exclusive Indian use on the Fort Belknap Indian reservation. *Winters v. United States*, 207 U.S. 564 (1908). Thus, such "impliedly reserved" water rights were established judicially under federal law as opposed to under any state or federal statutory law.

Reserved water rights present challenges for western water managers because many of their characteristics are antithetical to appropriative water rights and to the administration of such rights. For example, Indian reserved rights do not depend on beneficial uses defined under state law. Indeed, the standard under which they should be quantified is not clear. Further, the "first in time, first in right" hierarchies developed under state management systems are severely impacted by Indian reserved rights because of the priority date such rights enjoy. In addition, Indian reserved rights are inchoate, that is they do not depend on non-interrupted use like state appropriative water rights do. Hence, the integration of Indian reserved water rights into the water management systems of the West has the potential of disturbing many existing rights, and thus affecting many established property interests.

As noted, the reserved rights doctrine is a doctrine of implication. Its characteristics have been defined on an ad hoc judicial basis. In other words, as the facts of a case have presented new issues to the courts, they have fashioned rules and applied them to the case at hand. Of course, such rules are also viewed as precedent for the resolution of other similar cases. Thus, the western states have been and continue to be particularly interested in all legal interpretations of the reserved rights doctrine.

The Wyoming Supreme Court's decision below touches upon a number of issues of interest to the western states. It

decided important federal questions in a manner both at odds with the holdings of this Court, and lower federal courts, and in a fashion which conflicts with principles contained in this Court's decisions. Further, the court below decided federal questions not yet reached by this Court. For these reasons, it should be reviewed by this Court.

As Wyoming has noted in its petition for a writ of certiorari, there are dozens of general adjudication proceedings currently under way throughout the West which affect the water rights for some fifty Indian reservations and over 250,000 private individuals. In addition, efforts are under way to negotiate the water rights of a number of Indian tribes. Final determination by this Court of the significant federal questions ruled upon by the Wyoming Supreme Court will aid efforts to determine and quantify Indian water rights throughout the West, both by litigation and negotiation. This assistance will simplify and expedite the resolution of many pending cases.

Further, the decision below has cast a cloud of uncertainty upon numerous property rights which must be integrated with Indian reserved water rights. As a result, and for the reasons previously stated, the amici states urge this Court to grant Wyoming's petition for a writ of certiorari to review the decision of the Wyoming Supreme Court and to reverse it insofar as it inappropriately construes the doctrine of impliedly reserved Indian water rights.

SUMMARY OF ARGUMENT

The doctrine of reserved water rights is a doctrine of "implication" designed to provide water rights for federal reservations where such reservations were created without regard to accompanying water rights. When Congress has

spoken to the question of water rights, it has consistently deferred to state water law. Where such Congressional pronouncements exist with regard to a reservation, no reserved rights should be implied. Further, reserved water rights should be recognized only to the extent that the primary purpose of a federal reservation would be entirely defeated without them.

In the case below Congress gave explicit direction that water rights for the Wind River Indian Reservation be obtained under state law. Thus, no impliedly reserved water right should be recognized for the reservation. Further, the primary purposes of the reservation have been fulfilled after years of agricultural development based on acquisition of water rights under state law. Recognition of a federal reserved water right is therefore unnecessary.

Where reserved water rights are recognized, their quantification must be limited by certain restrictions prescribed by this Court. The Wyoming Supreme Court erred in its decision below with respect to the quantity of water rights it awarded the Indians on the Wind River Reservation, assuming such rights should have been awarded at all. Further, the court erred with respect to the priority date of a substantial portion of the Indian reserved water rights. Reserved water rights for lands which passed out of Indian ownership, but were then reacquired, should not, under the rulings of any federal court, automatically have a priority date as of the date of the original creation of the Indian reservation.

ARGUMENT

I. IMPLYING THE EXISTENCE OF A FEDERAL RESERVED WATER RIGHT IS UNWARRANTED IN THE FACE OF CONGRESSIONAL DIRECTION THAT WATER FOR AN INDIAN RESERVATION BE ACQUIRED UNDER STATE LAW AND WHERE SUBSTANTIAL WATER RIGHTS HAVE BEEN ACQUIRED UNDER STATE LAW FOR INDIANS ON THE RESERVATION.

The doctrine of reserved water right is one "built on implication and is an exception to Congress' explicit deference to state water law in other areas." *United States v. New Mexico, supra*, 438 U.S. at 715. Where treaties and other documents creating federal reservations have been silent with respect to water use, this Court has chosen to imply the existence of water rights without which the primary purposes of the reservation would be totally defeated. But because of the history of purposeful Congressional deference to state water law, the Court has limited the scope of the reserved rights doctrine and the quantity of water which may be claimed under it. *See, Cappaert v. United States*, 426 U.S. 128 (1976); *United States v. New Mexico, supra*, 438 U.S. 696.

The Wind River Indian Reservation was created by the Second Treaty of Fort Bridger, 15 Stat. 673 (1868). Subsequently it was reduced in size. The most substantial reduction occurred under the Second McLaughlin Agreement of 1904, which was ratified by the Act of March 3, 1905. 33 Stat. 1016 (1905) (hereafter referred to as the "1905 Act"). An active allotment program was undertaken with respect to the reservation. Approximately 2,500 allotments, comprising over 240,000 acres of land, passed into individual Indian ownership. Also, the 1905 Act ceded land to the U.S. Government. About 90,000 acres of this

land was entered and settled by non-Indians and another 336,000 acres were withdrawn for a federal reclamation project open to homestead entry under the Act of March 4, 1921. Ch. 161, 41 Stat. 1367 (1921).

Although the original documents creating the reservation were silent with respect to water rights, the 1905 Act was not. Article III of the act contained a "Water Proviso" wherein a portion of the receipts from the sale of ceded lands originally part of the reservation were sequestered to fund acquisition of water rights for Indians under Wyoming state law. Supplemental federal appropriations were also made available for this purpose. From 1905 to 1915, state water rights were obtained to allow Indians to irrigate some 145,000 acres of reservation land, including over two thirds of the lands for which federal reserved rights were awarded by the Wyoming Supreme Court in its decision below. Also, thousands of non-Indians purchased lands ceded under the 1905 Act and applied for and were granted state water right permits to irrigate some 400,000 acres. Indians and non-Indians cooperated in the development of irrigation projects and were governed by Wyoming water law.

Congress has directed that water rights be obtained under applicable state law for a relatively small number of Indian reservations. In most cases, as in *Winters*, Congress was silent with respect to water for Indian reservations. However, where Congress has explicitly addressed the question of water for a reservation, that direction should be binding. No implication is necessary as to Congressional intent where such intent has been made manifest by Congress itself. The Water Proviso of the 1905 Act expresses Congress' intent that water for the Wind River Indian Reservation be obtained pursuant to Wyoming state law. Nevertheless, the Wyoming Supreme Court chose to infer the existence of a contrary intent, namely

that Congress established water rights for the reservation without regard to state law. Indeed, the lower court sanctioned the special master's approach which assigned to Wyoming the burden of proving that a reserved right for the reservation did **not** exist.

Further, the Wyoming Supreme Court virtually disregarded the language of the Water Proviso of the 1905 Act, as well as actions carried out pursuant to the proviso to develop irrigable lands on the reservation with Wyoming granted water rights. The court simply concluded that the water proviso and its legislative history were no indication of Congressional intent concerning the reservation of water for the Shoshone and Arapaho Indian people. The court made no attempt to reconcile the explicit Congressional direction to comply with state law contained in the 1905 Act with its decision to imply the existence of a contrary intent to disregard state law.

It should also be noted that this Court has held the existence of a reserved federal water right is to be implied only if "the purposes of the reservation would be entirely defeated" without it. *New Mexico, supra*, 438 U.S. at 700. Thus, where Congress expressly creates another means to provide water for the purposes of a reservation, the justification for the implication of a reserved water right for that reservation is absent. *See*, Solicitor's Opinion Regarding Federal Reserved Water Rights in Wilderness Areas, M-36914 (Supp. III), July 26, 1988 (denying the existence of federal reserved water rights for wilderness areas because of legislative language and legislative history indicating that such rights should be obtained under state law). In the case below, neither the Indians nor their trustees presented evidence demonstrating that the purpose of the Wind River Reservation would be defeated without implication of reserved water rights. Indeed, it is difficult to envision how such a showing could be made in

light of the numerous water rights that have been obtained under Wyoming law and the substantial development that has taken place on the reservation based on those rights.

This Court should grant Wyoming's petition for writ of certiorari to review the Wyoming Supreme Court's interpretation of Congressional intent, in light of the explicit directions contained in the 1905 Act, and the actions taken pursuant to those directions. Where Congress has expressed its intent that water rights for a reservation be obtained under state law and where water rights for a substantial portion of a reservation have been so acquired, no impliedly reserved federal water right should be recognized.

II. ASSUMING, *ARGUENDO*, THAT A RESERVED WATER RIGHT SHOULD BE RECOGNIZED FOR THE WIND RIVER INDIAN RESERVATION, THE WYOMING SUPREME COURT ERRED IN THE QUANTIFICATION OF THAT RIGHT.

Eighty years after the *Winters* case was decided, reserved rights have been quantified for only a handful of Indian reservations. One important reason for this is that no general standard for quantification of Indian reserved rights has been established by this Court. In 1963, this Court found that the amount of water reserved for certain agricultural Indian reservations on the Colorado River was "enough water...to irrigate all the practicably irrigable acreage on the reservation[s]." *Arizona v. California*, 373 U.S. 546, 600 (1963)(*Arizona I*). Nowhere in the opinion did this Court declare that the practicably irrigable acreage standard is **the** standard by which quantification would (or should) be reached for all Indian reservations.

The standard for quantification of reserved rights has become more restrictive in cases decided after *Arizona I*. In 1976, this Court held that the amount of water for a federal reservation's reserved right must be "tailored" so as to be only that sufficient to meet its "minimal need." *Cappaert v. United States, supra*, 426 U.S. at 141. "The implied reservation of water doctrine," this Court stated, "reserves only that amount of water necessary to fulfill the purpose of the reservation, *no more*." *Id.* (emphasis added). Two years later this Court noted:

> In the arid parts of the West...claims to water for use on federal reservations inescapably vie with other public and private claims for the limited quantities [of water] to be found in the rivers and streams. This competition is compounded by the sheer quantity of reserved lands in the Western States, which lands form the brightly colored swaths across the maps of those states.

New Mexico, supra, 438 U.S. § 699. Where there is no surplus of water in a water course, the Court said, quantification of reserved rights requires a "gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators." *Id.*, at 705. Against this backdrop, the Court stated:

> Each time this Court has applied the 'implied-reservation-of-water-doctrine,' it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be *entirely defeated*.

Id., at 700 (emphasis added). The Court went on to define "purposes of the reservation" to mean its primary pur-

poses, as opposed to its related secondary purposes or uses. Although *New Mexico* dealt with non-Indian federal reserved water rights, the opinion analyzed Indian and non-Indian reserved rights interchangeably.

The next year, this Court dealt with a case involving Indian fishing rights and in its ruling set forth guidelines which apply to Indian rights to natural resources in general. The Court held that the underlying principle to be followed in quantifying Indian rights to natural resources is to provide Indians with a moderate standard of living. *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, *supra*, 443 U.S. 658 (1979). The Court indicated that its holding was indeed related to the standard for quantification of impliedly reserved Indian water rights stating:

> As in *Arizona v. California* [*Arizona I*] and its predecessor cases, the central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but not more than, is necessary to provide the Indians with a livelihood - that is to say, a moderate living.

Id. at 686.

In 1983, the United States and the Indian tribes sought an increase in their adjudicated water rights in *Arizona I* and the states sought review of the practicably irrigable acreage standard. To preserve finality in that case, the Court refused to reopen the quantification issue *Arizona v. California*, 460 U.S. 605 (1983) (*Arizona II*). However, the Court gave no indication in *Arizona II* that the practicably irrigable acreage standard of *Arizona I* must be applied universally to Indian reservations throughout the West.

In the instant situation two facts are particularly important. First, the Indian people living on the Wind River Reservation have developed substantial irrigated land within the reservation boundaries. Under Article III of the 1905 Act, water rights were originally acquired for 145,000 acres of reservation land, over two thirds of the same lands awarded a reserved right in the decision below. Perfection of these rights was pursued for many years by the federal Indian Service and extensions were granted by the Wyoming State Engineer where, for example, construction delays prevented timely application of water to beneficial use.

After *Arizona I* was decided the Bureau of Indian Affairs, successor to the Indian Service, ceased requesting extensions and water permits for 58,000 acres expired. However, this left in place perfected rights for some 87,000 acres of Indian land. The Wyoming State Engineer has made it clear that the expired permits could be reinstated upon receipt of proper applications. Existing rights have allowed for substantial development of agriculture on the reservation, and further development could be pursued by reinstating permits which have been allowed to lapse. Hence, the Wyoming Supreme Court did not need to recognize significantly greater water rights under the reservation doctrine to avoid "entirely defeat[ing]" the primary purpose of the reservation.

Moreover, in awarding a reserved right greatly exceeding historic irrigation development on the reservation, the Wyoming Supreme Court's decision is in direct conflict with a decision of the Ninth Circuit Court of Appeals. In *United States v. Walker River Irrigation Dist.*, 104 F. 2d 334 (9th Cir. 1939), the Ninth Circuit addressed the quantification of Indian reserved water rights where there was a history of irrigation development on the reservation. On the Walker River Indian Reservation in Nevada an

estimated 26.25 second feet of water had been historically used to irrigate 2,100 acres of land. *Id.*, at 340. There was no showing of "necessity or demand for cultivation of a larger area...." *Id.* Thus, the Ninth Circuit limited the reserved right to that exact amount. The court said:

> We are constrained to accept this estimate [26.25 c.f.s.] as a fair measure of the needs of the Government [as trustee for the Indians] as demonstrated by seventy years' experience.* * * So precious is every miner's inch of water in these parched regions that no arrangement should be countenanced which would encourage waste or tend to induce it.

Id., at 339-40.of water in these

Secondly, the Wyoming Supreme Court simply made no effort to integrate the "moderate living" standard of *Washington v. Washington State Commercial Passenger Fishing Vessel Association, supra*, with the "practicably irrigable acreage" standard of *Arizona I*. Rather, it mechanistically applied the practicably irrigable acreage standard as though no irrigation development had taken place on the reservation and as though the practicably irrigable acreage standard were the one and only standard for quantification of Indian reserved water rights.

The amici states assert that, given the restrictive language of recent cases decided by this Court concerning the proper standard for quantification of reserved water rights, specific guidance from this Court is needed with respect to the standard for quantification of Indian reserved water rights utilized by the Wyoming Supreme Court in the decision below. More specifically, assuming reserved rights should be recognized for the Wind River Reservation, this Court should accept the instant case to revisit the practicably irrigable acreage standard in light of its

subsequent holdings. For example, the Court should clarify the integration of the "moderate living" standard of the *Fishing Vessel* decision and the "primary purposes" standard of the *New Mexico* decision with the practicably irrigable acreage standard for use with respect to quantification of Indian reserved water rights.

III. ASSUMING, *ARGUENDO*, THAT RESERVED WATER RIGHTS SHOULD BE RECOGNIZED FOR THE WIND RIVER INDIAN RESERVATION, THE WYOMING SUPREME COURT ERRED WITH RESPECT TO THE PRIORITY DATE IT ASSIGNED TO SOME OF THOSE RIGHTS.

The Wyoming Supreme Court held that approximately 40,000 practicably irrigable acres, which were ceded by the Wind River Reservation Tribes in 1905 and then restored to the reservation from 1940 to 1974 by order of the Secretary of Interior, have a reserved water right with a priority date as of the date of creation of the reservation. The court stated no reasoning for this conclusion other than its concurrence with the special master's finding that the Indian's maintenance of an interest in the proceeds from the sale of ceded lands precluded a disestablishment of rights appurtenant those lands.

The Wyoming Supreme Court's ruling is inconsistent with this Court's decisions addressing disestablishment of Indian reservations, particularly *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), as well as those addressing the termination of Indian rights in disestablished lands, especially *Oregon v. Klamath Indian Tribe*, 473 U.S. 753 (1985). *Rosebud* indicates that the termination of Indian treaty rights by subsequent legislation may be found on the face of the legislation, in legislative history, or in circumstances surrounding its enactment. The cessation accom-

plished in the instant case by the 1905 Act, which diminished the reservation, occurred under circumstances virtually identical to those which this Court concluded constituted a disestablishment in *Rosebud*. Thereafter, beginning in 1940, portions of the ceded lands were added to or again made part of the Wind River Reservation for grazing purposes or were otherwise reacquired for the benefit of the reservation's tribes.

The court below concluded that the reservation had not been disestablished and, consequently, that reserved water rights for lands restored after 1940 were entitled to an 1868 priority date, the date of the treaty establishing the original reservation. However, with respect to the priority date for water to irrigate ceded lands restored to the reservation, *Rosebud* indicates that the date the reservation was originally created is inappropriate. In addition, the decision below is in conflict with this Court's decision in *Klamath*, where the Court held that disestablishment of a reservation terminates Indian rights in ceded lands.

In addition to the Wyoming Supreme Court's error with regard to water rights appurtenant to ceded lands restored to the reservation, the court also erred with respect to the priority date of lands conveyed to non-Indians or allotted to individual Indians and conveyed to non-Indian grantees, which were later reacquired by or on behalf of Indians. Here the court's holding conflicts with two opinions of the Ninth Circuit Court of Appeals.

In *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984), the Ninth Circuit held that rights to water accompanying homestead lands reacquired by an Indian tribe carry a priority date determined by state law and that rights to water accompanying lands for which no water right was perfected under state law have a priority date as of the time of reacquisition. In contrast, the Wyoming

Supreme Court held that irrigable lands ceded to the United States, conveyed under public land laws to non-Indians, and then reacquired by or on behalf of Indians have a priority date as of the date of the original creation of the reservation. Instead, the court should have held that such rights have a priority date as of the time of reacquisition or, in the alternative, a date determined under Wyoming law.

In *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981), cert. denied, *Walton v. Colville Confederated Tribes*, 475 U.S. 101 (1986), the Ninth Circuit held that a non-Indian owner of an original Indian allotment obtains a reserved water right which may be maintained by the non-Indian's continued use of the water or lost by his non-use. *Anderson*, held that tribes which reacquire land previously allotted obtain a reserved right with an original priority date, but only where a previous non-Indian owner has not lost his right through non-use. The Wyoming Supreme Court required no showing of continued use by intervening non-Indian owners but rather granted an 1868 priority date with respect to all reacquired lands.

Assuming, *arguendo*, that reserved water rights should be recognized for the Wind River Indian Reservation, the court below erred in its decision regarding the priority date of the rights appurtenant to many parcels of land. This Court should grant Wyoming's petition for a writ of certiorari to correct this error.

CONCLUSION

For the reasons stated above, the amici curiae states respectfully urge that Wyoming's petition for a writ of certiorari be granted.

Respectfully Submitted,

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No. 88-309

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF WYOMING,

Petitioner,

v.

UNITED STATES OF AMERICA, SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Wyoming

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Under the implied-reservation-of-water doctrine, a Federal reserved water right of 500,000 acre feet was quantified based on over 100,000 acres of "practicably irrigable acreage" within the present boundaries of the Wind River Indian Reservation in Wyoming. Pursuant to a 1905 congressional directive, however, water rights for the irrigation of 145,000 acres of Indian lands had previously been obtained under state law, overlapping more than 70% of the lands for which the Federal right was subsequently quantified.

The question presented is:

1. In the absence of any demonstrated necessity for additional water to fulfill Reservation purposes and in the presence of substantial state water rights long in use on the Reservation, may a reserved water right be implied for all practicably irrigable lands within the Reservation?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, State of Wyoming, and the respondents, United States of America, Shoshone Tribe of the Wind River Indian Reservation, Northern Arapaho Tribe of the Wind River Indian Reservation, Mary O. Ahlborn, Eva M. Barnett, Owen Barnett, Bradford Bath, Donald Bath, Black Butte Livestock Company, Campbells, Inc., City of Riverton, Wyoming, Kenneth Ward Crandall, Phyllis L. Crandall, DHB & Co., Barbara J. Daniels, Billie M. Daniels, Deaver Irrigation District, Carl Dockery, Carol Dockery, Clyde R. Fisher, Gloria A. Fisher, Charles Goldben, Grace Graboski, Griffin Brothers, Incorporated, Olga J. Harvey, Robert W. Harvey, Albert Hornecker, Hornecker Livestock Co., Inc., Bertha Jones, Brenda Joyce Kellogg, Gary V. Kellogg, Irene M. Long, Russell E. Long, Elsie Martin, Richard Martin, William A. Matthews, Arthur D. McCumber, Marvin W. Meyer, Ernestine S. Meyer, Midvale Irrigation District, Carolyn R. Nelson, Vern Nelson, Norwest Bank of Omaha, N.A., Norris Edwin Odee, F. Louise Odee, William Okie, Kenneth Outland, Iona Outland, Owl Creek Irrigation District members, PLB & Co., Sylvia Paulsen, Red Creek Cattle Company, Red Lane Watershed Improvement District, Jerry D. Redding, Sheila C. Redding, Charles Richardson, Riverton Valley Irrigation District, C. Duane Rush, Kathryn C. Rush, Brian F. Sanford, Kathleen Sanford, Norman L. Sanford, Daisy E. Sessions, Newell S. Sessions, Barbara Smith, Robert Stewart, Town of East Thermopolis, Wyoming, Ralph Floyd Urbigkit, V E Bar Livestock Company, Barbara Webber, Landis Webber, Delores J. Weese, Raymond C. Weese, Willwood Irrigation District, Ruth Clare Yonkee.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-309

STATE OF WYOMING,

Petitioner,

v.

UNITED STATES OF AMERICA, SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Wyoming

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Wyoming Supreme Court (Pet. App. A, p. 1a, et seq.) is reported at 753 P.2d 76 (Wyo. 1988). The unreported trial court opinions include: the amended judgment and decree of the state district court, May 24, 1985 (Pet. App. D, p. 168a, et seq.); the district court's Order of May 24, 1985, ruling on its master's supplemental and final report (Pet. App. C, p. 121a, et seq.); the district court's judgment of May 10, 1983, ruling on its master's initial report (Pet. App. F, p. 202a, et seq.); and the district court's order of June 8, 1984, ruling on various post-judgment motions (Pet. App. E, p. 185a, et seq.). The reports of the state court's master include: the supplemental and final report of the district court's master of June 1, 1984 (Pet. App. G, p. 280a, et seq.) and the master's initial report of December 15, 1982 (Pet. App. H, p. 367a, et seq.).

The Federal district court's order, remanding the matter back to state court and its findings of fact and conclusions of law therein (Pet. App. I, p. 718a, et seq.) dated May 31, 1977, have not been reported.

JURISDICTION

The decision of the Wyoming Supreme Court was rendered on February 24, 1988, affirming in part and reversing in part the amended judgment and decree of the state district court, and remanding the matter for further proceedings consistent with the opinion. The Wyoming Supreme Court denied timely petitions for rehearing on April 22, 1988. This Court's Order Extending Time to File Petition for Writ of Certiorari to August 20, 1988, was entered in A-14 on July 7, 1988. On August 19, 1988, the petition for a writ of certiorari was filed and was granted, with respect only to question 2, on January 23, 1989. On February 23, 1989, the Court granted Petitioner's Motion. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

STATEMENT

This general adjudication of all water rights in Wyoming's Big Horn River Basin, comprising over thirteen million acres and including the Wind River, began in January, 1977, with the filing of the petitioner's complaint and service of process on over twenty thousand water users. The United States, claiming water rights in its proprietary capacity and as trustee for the Shoshone and Arapaho Tribes of the Wind River Indian Reservation (hereinafter sometimes referred to as the "Reservation"), removed the adjudication to the United States District Court which remanded the adjudication to state court. The state district court denied motions to dismiss by the Tribes and the United States, allowed the Tribes to intervene, and appointed a special master. The master divided the adjudication into three phases: (1) federal water right claims by and on behalf of the Tribes of the Reservation, which are now before this

Court, (2) federal water right claims of the United States in its proprietary capacity (e.g., Yellowstone National Park and two national forests) which were resolved by negotiation, and (3) approximately 27,000 claims by all parties based primarily on state law, which are still before the state district court's master.

Development of the Big Horn Basin

Prior to the arrival of non-Indian settlers in the early 1800's, Wyoming was inhabited exclusively by competing Indian tribes. Beginning in the 1840's, the Shoshone Tribe made occasional forays from their ancestral territory across the mountains into the Wind River Valley to hunt and to fight competing tribes. At the time the Reservation was created, however, no ethnological group within the Shoshone Nation classifiable as "Wind River Shoshones" existed. Indeed, the First Treaty of Fort Bridger, 1851, assigned the Wind River Valley to the Crow Indians. It was not until 1868 that the United States granted Washakie's desire to relocate his band to the Wind River.

Non-Indian development of lands within the Big Horn Basin was induced by various land disposal acts resulting from Congressional recognition that settlement and subsequent development of the vast western public lands would not proceed without favorable legislation. Within the Big Horn Basin, public lands were disposed of under the Cash Entry Act, the State Selection Act, the Homestead Act, the Stock Raising Homestead Act, the Mining Act, the Desert Land Act, the Carey Act and the Reclamation Act. Because water rights did not accompany a land patent established under any of the disposition acts, it was the responsibility of the settlers seeking patents under the disposition acts to initiate their own water rights under state law. In the case of several of these acts, however, no patent would be granted until water rights were obtained.

By the mid-1880's, non-Indian settlement of the basin was proceeding apace. Farms, ranches, and small com-

munities had been established. The earliest settlers obtained the most desirable lands and later settlers moved into the interior valleys of the basin, necessitating the construction of large irrigation projects to supply water to the newly-settled lands. As early as 1904, President Theodore Roosevelt authorized construction of the Shoshone Reclamation Project, an effort spanning over 50 years and ultimately resulting in the development of over 90,000 acres of irrigated lands in the basin. In 1905, the Governor of Wyoming initiated a survey of lands within the Wind River Basin which were formerly a part of the Reservation but which were ceded to the United States by the Act of March 3, 1905, 33 Stat. 1016 ("1905 Act"). Pet. App. X, p. 769a. The survey set out approximately 335,000 acres of land as potentially irrigable and secured all of the remaining water rights for the Wind River drainage, essentially determining the boundaries for what would later become the Riverton Irrigation Project. As a consequence of these efforts, and thousands like them, present non-Indian irrigation comprises approximately 550,000 acres, of which 120,000 acres are within the exterior boundaries of the Reservation.

The Wind River Indian Reservation

Originally part of the public domain created by the Louisiana Purchase, the Wind River Indian Reservation was established for the Shoshone by the Second Treaty of Fort Bridger of 1868, 15 Stat. 673. Pet. App. AA, p. 793a, et seq. Subsequently the Arapaho were settled on the Reservation, for which the Shoshone were later compensated. Through a period ending in 1905, the Reservation was three times reduced in size by agreement with the Tribes. , The last and most substantial reduction (1,480,000 acres) resulted from the Second McLaughlin Agreement of 1904, ratified by the 1905 Act. Under an active allotment program, some 2,500 allotments, comprising over 240,000 acres, passed into individual Indian ownership. For roughly 35 years the remaining or "diminished" Reservation's exterior boundaries remained stable. Outside of those boundaries, however, the ceded

lands were returned to public domain status, within that area 88,000 acres were entered and settled by non-Indians by 1918 and 336,000 acres were withdrawn for a major reclamation project, to be disposed of by homestead entry.

Reservation Water Development Pursuant to State Law

Under what was known as the "Water Proviso" of the 1905 Act's Article III (Pet. App. X, pp. 778-779a), a part of the proceeds from the sale of ceded lands was designated to obtain water rights for the Indians under Wyoming law. This amount, together with supplemental federal appropriations of $2,264,100, was used to fund the acquisition of state water permits and the development of canals, reservoirs and cultivated lands to perfect the permitted rights. By 1915, state water rights had been acquired on behalf of the Indians for the irrigation of approximately 145,000 acres of Reservation lands, including over 70% of the lands for which Federal reserved water rights were eventually awarded, and major federal irrigation projects had been constructed for the benefit of Indian lands. During the same period, 3,500-4,000 non-Indians entered the lands ceded by the 1904 agreement and applied for state permits to irrigate approximately 400,000 acres. Development of Indian irrigation projects on the Reservation was characterized by extensive cooperation between the Indian Service and the Wyoming State Engineer. From 1905 to 1963, as delays in completing project construction on portions of the diminished Reservation prevented timely application of water to beneficial use upon many Indian tracts, extensions were routinely granted by the State Engineer. Furthermore, during this period, water was applied to beneficial use on many Indian tracts and certificates of appropriation were issued by the State Board of Control confirming water rights, generally with a 1905 priority date.

As would be expected, however, announcement of *Winters v. United States*, 207 U.S. 564 (1908) (hereinafter "*Winters*"), and the opinions which it affirmed, caused

some Indian advocates to seek application of the *Winters'* implied-reservation-of-water doctrine to the Wind River Indian Reservation. Consistent with its 1905 decision to require the Tribes to define and perfect their water rights pursuant to Wyoming law, Congress rebuffed attempts in 1914 to provide for an express reserved water right for the Reservation. The steady progress of the Indian Service in its work to build irrigation systems within the Reservation doubtless lent support to arguments of Congressmen that the system put in place by the 1905 Act was working satisfactorily. Beginning in 1963, however, unperfected state-awarded water right permits for 58,000 acres were allowed by the United States to expire, leaving perfected state-awarded water rights in place for 87,000 acres.

Restoration and Reacquisition of Ceded Lands

Beginning in 1940 and ending in 1974, large tracts of vacant ceded lands, needed by the Tribes for grazing purposes, were permanently "restored to" and "made a part of" the Reservation by the United States. Pet. App. L, N-V, pp. 729a, 731a-752a. Approximately 42,000 acres of lands originally allotted to individual Indians have been conveyed to non-Indian grantees within the Reservation. In addition, several thousand other non-Indians live either on ceded lands patented under the public land laws after 1905, on lands in the large Riverton Reclamation Withdrawal located on ceded lands, within the current boundaries of the Reservation, or on land leased from Indians.

Claims By and on Behalf of the Tribes

In this adjudication, the United States claimed federal water rights on behalf of the Reservation's Tribes under the implied-reservation-of-water doctrine, including some 570,000 acre feet for historic and future irrigation. The Tribes subsequently concluded that the United States' reserved water right claims were inadequate and filed their own supplemental claims for an additional 1,103,000 acre feet for irrigation. In addition, non-Indian grantees who

held lands originally allotted to individual Indians subsequently claimed reserved water rights.

Adjudication of the Reservation's Reserved Water Right

After trial, the master recommended a decree granting an 1868 reserved water right for a variety of purposes, including agricultural uses which were quantified based on "practicably irrigable acreage" within the Reservation. The district court rejected any award for non-agricultural purposes and confirmed the master's recommended award based on "practicably irrigable acreage." [1] A closely divided Wyoming Supreme Court (3-2) increased the total award to 500,420 acre feet, Pet. App. A, pp. 56-58a.

Positions of the Parties Below

The United States and Tribes asserted an 1868 priority for a reserved water right based on an amount of water sufficient to irrigate all practicably irrigable acreage within the Reservation and for other broadly defined purposes. The State and most other parties, while acknowledging the Reservation's primary agricultural purpose, asserted that any reserved water should be quantified based solely on the amount of water which was necessary to ensure that the Reservation's primary agricultural purpose was not entirely defeated, to meet the Reservation's minimum needs, or to provide a moderate standard of living for the Indians.

Effect of the Decision Below Upon State-Awarded Water Rights

The adverse effect of quantification of the Reservation's reserved water right was well-documented below. The master devoted twelve findings of fact specifically to the effect of quantification of an 1868 Federal reserved water right upon pre-existing state-awarded water

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[1] Pet. App. D, pp. 169-172a, paragraph 1; *Id.*, at p. 172a, paragraph 2; *Id.*, at p. 168a, paragraph 3, and p. 182a.

rights.[2] In order to soften the effect of the reserved right,[3] the master limited development of the future projects' portion of the reserved water right to no more than 10% of the total reserved right in each decade following the decree, unless storage facilities were in place to provide all water necessary for Indian and non-Indian users. Pet. App. H, pp. 584a, 626a-627a. The district court originally agreed with the master's conclusion that state-awarded water right users would be damaged by the reserved water right and so found. Pet. App. F, p. 258a, Finding of Fact 98. On this basis, the district court ruled that upstream storage would be required to be in place to provide water for the additional acreage of each of the five future projects before *any* construction of the project could begin. Pet. App. F, p. 236a. Finding of Fact 98 and the storage requirement were, however, deleted by a subsequently-assigned different district judge who heard no additional evidence on the injury question. The closely divided Wyoming Supreme Court (3-2) rejected the storage limitation developed by the master and the district court. Pet. App. A, p. 71a. The court opined that the storage requirement was inconsistent with the object of the reserved water right which it described as a prior entitlement to the waters of the Reservation. *Id.* The dissent, however, would have gone beyond the protection offered by the storage requirement and denied the Federal reserved

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[2] Pet. App. H, pp. 688a-690a. *See also, id.* at 629a-630a. Among his findings, the master included that Congress intended and approved the appropriation system for Wyoming but that "today owners of water rights in Division 3 may suffer damages from an inability to put their rights to full use following the emplacement of an 1868 priority date for the Indians in the upper reach of the Wind River." Pet. App. H, p. 688a, Findings of Fact I.2.

[3] The master, while recognizing the injustice of his decision upon non-Indian users, seemed to believe himself powerless to limit quantification of the reserved water right due to injury to state-awarded water rights. The master thought that doing so would "be the imposition of a second wrong to atone for the first." Pet. App. H, p. 626a.

water right for the claimed future projects. Pet. App. A, p. 84a.

Subsequent Developments Not Disclosed by the Record

Though the future projects authorized by the decree below remain unbuilt, non-Indian water users have already felt the sting of the Tribes' reserved water right. On July 14, 1988, the Bureau of Indian Affairs, honoring for the first time a demand by the Tribes for delivery of their senior reserved water rights, closed and locked the headgates of all non-Indian irrigators on the Crowheart Irrigation Unit,[4] a part of the federally-funded Wind River Project on the Reservation. Cross-Pet. App., City of Riverton, *et al.*, Case No. 88-553 (hereafter "Riverton Pet. App."), p. 6a. The Tribes' demand[5] for delivery was respected despite the fact that the Canal was at near capacity, that at least 75 c.f.s. of water was running uncaptured in Dinwoody Creek at the Canal's headgate, and that non-Indian users on the Project are financially responsible for at least, if not more than, their *pro rata* share of annual Project maintenance and operation. Non-Indian irrigators quickly

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[4] Because the Unit's supply canal lacks the capacity to deliver water to all lands within the Unit at one time, the Bureau has historically rotated water between its upper and lower reaches in order to provide all users with an equivalent supply, a common practice in the West.

[5] While the Tribes' only 1988 demand was for irrigation water, the Tribes also announced their intent to devote portions of their future project reserved water right, though quantified solely for agricultural uses, to the maintenance of instream flows and lake levels for fisheries purposes in Bull Lake Creek and Bull Lake Reservoir. Doing so would substantially preempt non-Indian irrigation within the federally-funded Riverton Irrigation Project, which is operated by the Midvale Irrigation District, despite the fact that the act authorizing the construction of Bull Lake Reservoir specifically devoted its use to the Riverton Project and restricted the rights of the Tribes with respect to the use of lands associated with the reservoir. 43 U.S.C. §§ 597a and 597c. The seriousness of the Tribes' intention was underscored on September 22, 1988, when an armed contingent of Indian officials ordered the District's dam tender from the Reservoir and blocked the road to the dam.

filed petitions to enjoin the Bureau's actions, under the case number assigned this matter below. Riverton Pet. App. p. 2a, *et seq.* These were denied. On July 29, 1988, the Tribes and Wyoming agreed jointly to recommend management alternatives to the Bureau which would allow non-Indians again to divert. On August 2, 1988, the practice of rotation was resumed, after leaving non-Indian irrigators on the Crowheart Unit without water for three weeks in the exceedingly hot and dry Wyoming summer of 1988. Riverton Pet. App., p. 1a.

The Tribes' 1988 interference with non-Indian uses, historically of equal seniority to their own, and their expressed intent to convert the massive future project award to instream uses, recently prompted Wyoming to enter an interim one-year agreement with the Tribes by which Wyoming has agreed to forego tax revenues from the Reservation and provide other funds in the amount of $5,500,000, simply to prevent the Tribes' enforcement of their Federal reserved water right during 1989.[6] The total amount foregone by Wyoming in 1989 is more than double the Tribes' recent *total* annual crop production on Indian lands, including those leased to non-Indians.[7]

SUMMARY OF ARGUMENT

The question before the court concerns the appropriate standard of quantification of the implied federal reserved water right for agricultural[8] Indian reservations, typi-

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[6] In exchange, the Tribes will share surpluses and shortages of available water with non-Indians in accordance with historical irrigation practices on the Reservation.

[7] According to reports of the Bureau of Indian Affairs, the value of total crop production in 1985 was 1.9 million dollars, in 1986, 2.4 million dollars, and in 1987, 2.2 million dollars.

[8] Agricultural Indian reservations are those which were established for the purpose of converting nomadic peoples to a pastoral life, e.g. to create an independent farming community as in the case of the Wind River Indian Reservation. *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 117-18 (1937), hereinafter *"Shoshone."*

cally set aside during the nineteenth century, well before significant irrigation water rights were obtained from the states by non-Indian settlers in the West. In 1963, this Court provided that the reserved water right would be in the amount of water required to irrigate all the "practicably irrigable acreage" (PIA) on such reservations. Subsequently, for other types of reservations (Indian and non-Indian), the Court affirmed reserved rights in natural resources only in the amounts *necessary* to meet the reservation's minimal needs,[9] to ensure that the primary reservation purpose was not entirely defeated,[10] and to provide a moderate living[11] for its Indian residents. These two substantially different quantification approaches[12] have caused conflicts and confusion among the lower courts and, as a result, this Court granted certiorari to the Supreme Court of Wyoming to review the following question:

> In the absence of any demonstrated necessity for additional water to fulfill reservation purposes and in the presence of substantial state water rights long in use on the reservation, may a reserved water right be implied for all practicably irrigable lands within a reservation set aside for a specific tribe?

This Court should now confirm that the same concepts of necessity which are applicable to all other types of reservations apply equally to agricultural Indian reservations. In doing so, the Court should provide an approach to quantification by the trial courts which allows them to

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[9] *Cappaert v. United States*, 426 U.S. 128 (1976), hereinafter *Cappaert*, national monument water rights.

[10] *United States v. New Mexico*, 438 U.S. 696 (1978), hereinafter *New Mexico*, national forest water rights.

[11] *Washington v. Washington State Commercial Fishing Vessel Association*, 443 U.S. 658 (1979), hereinafter *"Fishing Vessel,"* Indian fishing resource.

[12] Interestingly enough, in the recent cases, the Court referred to the earlier cases which established the practicably irrigable acreage standard as support for the limitations based on necessity which were later imposed on the reserved right.

fairly and equitably tailor the reserved right doctrine to the needs of individual reservations. More specifically, in this matter, the Court should: (1) answer the question presented in the negative, (2) reverse the decision of the Wyoming Supreme Court that the reserved water right for the Wind River Indian Reservation is quantified in an amount required to irrigate all of the practicably irrigable land on the Reservation, and (3) remand with instructions to enter a decree for a reserved right in an amount necessary to irrigate those Reservation lands which have previously been irrigated but which are without a state water right.

I. Early in this century, this Court created [13] the "reserved water right doctrine" to remedy serious oversights by the other two branches of government. By doing so, it judicially provided what Congress or the President neglected for land reservations, i.e. enough water to carry out the primary purpose of the reservation. Initially applied to Indian reservations, and more recently applied equally to other federal reservations,[14] the reserved right doctrine had the effect of allowing the United States, whether in its proprietary or fiduciary capacity, to go to the head of the line of all water users, bypassing and receiving water ahead and to the detriment of previously senior users whose water rights were established under state law after the date of the land reservation. Because of their retrospective nature, Federal reserved water rights seriously alarmed existing water users and the states which had granted them water rights.[15] Nevertheless, through approximately the mid-

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[13] *Winters v. United States*, 207 U.S. 564 (1908). Consequently, the ensuing body of law is frequently also referred to as the "*Winters* doctrine."

[14] *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955), federal power withdrawal; *Arizona v. California*, 373 U.S. 546 (1963), hereinafter *Arizona I*, national forests and wildlife refuges; *Cappaert*, national monument; *New Mexico*, national forest.

[15] Initially, the principal problem faced by existing water users was the inability to determine the scope and nature of the ubiqui-

1960's, the Federal doctrine continued to expand to the detriment of non-federal water users and state water resources planning in the arid western states. Finally, as in the case of many other developing federal doctrines, the pendulum began to return towards a central position in the 1970's. In three landmark cases, this Court announced that it would carefully scrutinize awards of federal reserved natural resources rights to insure that they were only in those amounts necessary to meet the reservations' "minimal needs," *Cappaert*, 426 U.S. at 141, to prevent the reservations' "primary" purpose(s) from being "entirely defeated," *New Mexico*, 438 U.S. at 700, and to provide reservation Indians a "moderate living." *Fishing Vessel*, 443 U.S. at 686.

II. Although this careful attention to the amount of the Federal reserved water right was welcomed by western water users, significant difficulties remained with the reserved right for agricultural Indian reservations. During the early and mid-1900's, the Federal trial courts,[16] state supreme courts[17] and Federal appeals courts[18] were inclined to protect water rights of agricultural Indian reservations, but only to the amount of reasonably feasible needs. When there had been ample opportunity for agricultural development, however, the re-

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tous reserved water right. The United States' success in asserting sovereign immunity eventually led to the adoption of the McCarran Amendment in 1952, now codified at 43 USC § 666, under which that defense was waived in general adjudications of water rights. *See United States v. District Court in and for the County of Eagle*, 401 U.S. 520 (1971), hereinafter *Eagle County; United States v. District Court in and for Water Division 5*, 401 U.S. 527 (1971), hereinafter *Division 5; Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), hereinafter *Colorado River*; *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545 (1983).

[16] *United States v. Wrightman*, 230 F. 277 (D. Ariz. 1916).

[17] *Byers v. Wa-Wa-Ne*, 86 Or. 617, 169 P.121 (1917).

[18] *United States v. Walker River Irrigation District*, 104 F.2d 334 (9th Cir. 1939).

served water right was quantified based on historical experience. In 1963, however, this Court established what appeared to be a rigid and universal standard in *Arizona I*, 373 U.S. at 600-601. For five agricultural Indian reservations on the lower Colorado River, the Court approved the use of the "practicably irrigable acreage" standard for the quantification of the reserved water right. Under that standard, reserved water rights for those agricultural reservations were based on the amount of water required to irrigate all of the practicably irrigable land within each reservation. The rationale for that standard was that it was convenient, relatively easy to apply, provided water for current and future needs of the reservations and provided a much-needed certainty of the amount of the reserved water right.

III. While the PIA standard may have made sense for those Colorado River reservations [19] and in spite of this Court's 1983 reaffirmation of the standard *for those reservations*,[20] the standard's subsequent application to other reservations has not been satisfactory. In general, the "practicably irrigable acreage" standard not only creates problems of proof but also results in the award of water rights far in excess of the needs of a reservation's primary purpose (usually through awards for hypothetical "future" irrigation projects) and causes massive dislocations among water users under state law. For example, in the adjudication below, the amount of "practicably irrigable acreage" on the Wind River Reservation was roughly twice the amount of land historically irrigated by large government irrigation projects constructed during 1905-1920. During the same period, state water rights were acquired pursuant to Congressional direction for those existing projects and for other Indian lands

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[19] Originally having been set aside for unknown Indian tribes of uncertain future water requirements.

[20] *Arizona v. California*, 460 U.S. 605 (1983), hereinafter *Arizona II*, in which concepts of *res judicata* precluded the Court from reexamining the "practicably irrigable acreage" standard. *Id.* 460 at 625-626.

within the Reservation. The vast new award now prompts the Reservation's Tribes to seek permission to sell or export their excess water from the reservation and to change excess water to non-agricultural purposes. That water historically had been used by non-Indians who, individually or as part of federal projects, had been induced by the United States to settle in and around the Reservation and to obtain water rights under state law. In other words, the quantification of the reserved water right for agricultural Indian reservations was a difficult problem for which a simple solution, the "practicably irrigable acreage" standard, was devised. Unfortunately, however, regardless of its deceptive straight-forwardness, use of the "practicably irrigable acreage" standard in this adjudication provided an unanticipated windfall to the Tribes and caused an injustice to their non-Indian neighbors.

IV. The complexity and flexibility required to quantify Indian reserved water rights has not escaped the attention of this Court. Nevertheless, the two distinct lines of cases with differing approaches to quantification (maximization v. minimization) have caused untold confusion in the lower courts, a confusion which this Court now has an opportunity to resolve. Without violating the principles announced in either line of cases, this Court should establish an approach to quantification which allows trial courts the flexibility necessary to fashion varying awards of water to agricultural Indian reservations in varying circumstances. Instead of requiring lower courts to adhere to the "practicably irrigable acreage" standard, this Court should specify those *factors* to be considered when tailoring a reserved right award for any particular agricultural reservation, including: the extent of its historic irrigation; lands which could have been reasonably foreseen to be irrigated at the time of this reservation but have not yet been irrigated; the state awarded water rights which have been granted for Indian agricultural use on the reservation; non-irrigation agricultural needs of the reservation; and the impact of the reserved water

right on non-Indians using water under state law. Evidence on these factors will allow the trier of fact to reach a quantification which insures that the reservation's minimal agricultural needs are met, that its primary purpose will not be entirely defeated, and that its Indian residents maintain a moderate standard of living, all as circumscribed by the need for the sensitive application of the reserved water right doctrine as mandated by this Court in *New Mexico*.

Indian Tribes inevitably will point out that the primary agricultural purpose of such a reservation is now outmoded, i.e. that it may be impossible to generate a moderate living for its Indian residents based solely on agriculture. Although that may well be true, relief from that difficult situation is appropriately sought from the Congress or the Executive, whichever established a reservation, and not from the Judiciary. If current circumstances have outmoded a reservation's original purpose, Congress or the Executive should expand the purposes. If the expanded purposes require additional water, a new reserved water right with a recent priority date may be expressly created or appropriate state-awarded water rights secured. If the new rights are insufficient to provide all water needed by the new purposes, public funds may be expended to acquire the existing water rights of others. Under any circumstances, water for secondary uses should be obtained under state law.

ARGUMENT

I. The Federal Reserved Water Right Doctrine Was Created By This Court As A Safety Net Or Insurance Policy To Cure Retroactively Congressional And Executive Oversights Which Threatened To Leave Certain Indian Reservations Without Necessary Water. Water Rights Should Not Be Granted Under The Doctrine When There Is No Demonstrated Need For Reserved Water In Addition To That Water Which Is Available To A Reservation From State Water Rights Which Were Acquired Pursuant To Congressional Direction.

The doctrine of Federal reserved water rights, or *Winters* doctrine, was created shortly after the turn of this century by Federal courts to repair oversights by Congress and the President. When reserving or withdrawing public domain lands from private entry, the executive and legislative branches of the federal government often neglected to reserve water for the withdrawal or otherwise to secure water to serve the reservation's needs. In water-short areas, this oversight bore the seeds of potential disaster since subsequent appropriators continued to perfect water rights, under state law, thereby depriving the federal land reservation of essential and necessary water.[21]

As most recently defined by this Court in *New Mexico*, such an implied water right is created under Federal law only to serve the *primary* purpose of a land reservation, a national forest in that case. On the other hand, water rights for secondary purposes or uses are to be obtained under state law. The implied reserved water right is

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[21] In a series of opinions beginning in 1908, this Court announced and began to define this curative concept in a series of decisions which provided that, long after the actual creation of a Federal reservation, the courts may create or newly recognize an implied reservation of water to accompany the earlier express reservation of land. To circumvent the water rights of intervening appropriators under state law, the implied reserved water right was given a retrospective priority as of the date of the land reservation. *Winters*, 207 U.S. at 564.

quantified for only that amount necessary to insure that the primary purpose is not entirely defeated, to meet the "minimal needs" [22] of the primary purpose and, perhaps, to provide Indians with "a moderate living" standard.[23] Since the "priority" of the reserved right is generally the date on which the land reservation was made for the reservation's primary purpose, the reserved right will "antedate" subsequent appropriations of water under state law, even though those appropriations often precede actual use of reserved waters by decades, thereby precluding state appropriators from continuing their own uses, so as to make water available to carry out the purposes of the land reservation. Because of the potential injustice of this involuntary judicial transfer of water from individual appropriators to Federal reservations, the *New Mexico* Court unanimously applied the reserved right doctrine "with sensitivity to its impact upon those who have obtained water rights under state law and Congress' general policy of deference to state water law." [24] Those subsequent cases, to be sure, dealt with reservations other than agricultural Indian reservations. Nevertheless, it is long settled that the same reasoning under which Federal courts created implied reserved water rights for Indian reservations is precisely appli-

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[22] *Cappaert*, 426 U.S. at 141, involving a national monument, and marking "a turning point in the Court's reserved rights jurisprudence." Fisher, *The Winters of Our Discontent: Federal Reserved Water Rights in the Western States*, 69 Cornell L. Rev. 1077, 1085 (1984).

[23] This Court recently announced that, with regard to Indian reservations, natural resources are to be allocated in such a way as to provide a "moderate living" for the Indian residents of the reservation. *Fishing Vessel*, note 11, above, 443 U.S. at 686-687. Although *Fishing Vessel* dealt with Indian fishing rights, its teachings have been applied to Indian reserved water rights. *United States v. Adair*, 723 F.2d 1394, 1415 (9th Cir. 1983), *cert. denied sub nom., Oregon v. United States*, 467 U.S. 1252 (1984).

[24] *New Mexico, supra*, 438 U.S. at 718 (Powell, J., concurring and dissenting).

cable to non-Indian reservations.[25] *Arizona I*, 373 U.S. at 601.

In the instant case, the Wind River Indian Reservation was established by treaty in 1868, *without* an express reservation of water. As a practical matter and as observed by the state-court master below, at that time Congress probably gave no thought whatsoever to the legal basis of the Reservation's water supply. Tr. 53 (10/23/80). By 1905, however, Congress directed the:

> . . . surveying, platting, making maps, payment of the fees, and the performance of such acts as are required by the statutes of the State of Wyoming in securing water rights from said State for the irrigation of such lands as shall remain the property of said lands as shall remain the property of said Indians, whether created within the territory intended to be ceded by this agreement or within the diminished reserved.

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[25] When the United States itself is defending against *Winters* claims, it is not bashful about imposing the concepts announced by this Court in *Cappaert*, *New Mexico*, and *Fishing Vessel*:

> Promotion of "habits of industry and thrift" (207 U.S. at page 567 [*Winters*]) is not realized by making available a plethora of water by means of which the Pima-Maricopa Indians could become a leisure class of non-farming landlords reaping at ease the fruits of labor not their own. The Winters Doctrine was designed to provide Indians with the opportunity, in the form of irrigation water, whereby they could help themselves become proficient farmers. Thus, by using the reserved water as the means for progress, they would acquire 'habits of industry and thrift." This would enable them to compete more effectively with non-Indian irrigation farmers.

Gila River Pima-Maricopa Indian Community v. United States, before the Indian Claims Commission, Docket No. 236-C, Defendant's [United States'] Objections to Plaintiff's Requested Findings of Fact; Defendant's Requested Findings of Fact; and Brief on Loss of Use of Water, April 1978, at 299-300. In that proceeding, the United States argued, "*Cappaert* interpreted and applied the Supreme Court's decision in [*Arizona I*] as limiting the *Winters* Doctrine. . . ." *Id.*, p. 20.

Pet. App. X, p. 778a-779a. Nevertheless, seventy-five years later in the adjudication below, the United States and Tribes claimed implied reserved water rights for the Reservation.

In reviewing those claims, the initial task for the Wyoming courts was to identify the Reservation's primary purpose,[26] which was found to be solely agricultural. This finding was, of course, based primarily on the words of the Treaty, which describe the Wind River as one of two "agricultural reservations." Pet. App. AA, p. 798a.[27]

The issue now before the Court is whether the Wyoming Supreme Court properly quantified an implied Federal reserved water right for the Wind River Indian Reservation, one hundred and twenty years after its creation for agricultural purposes. The award below was based solely on the Reservation's total amount of "practicably irrigable acreage," some 100,000 acres. This was far in excess of the Reservation's abundant his-

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[26] Although the United States and Tribes asserted an all-inclusive "permanent homeland" purpose for the Reservation, the evidence was surprisingly uniform that, while the Reservation was of perpetual *duration*, its primary *purpose* was agricultural. The Tribes' own exhibits demonstrated the Shoshone Tribe's expectation of, indeed desire for, an agricultural reservation prior to 1868. Tribes Exs. OCS-7, p. 170; OCS-22, p. 639; OCS-24, p. 82; OCS-33, p. 5 (handwritten), p. 2 (typewritten); and OCS-50, p. 104. Tr. 9209-9210, Testimony of Tribes' expert Omer C. Stewart. The Shoshones' desire was fulfilled with reservation of the Wind River Valley to which they were allowed to go in order "to grow wheat and corn, and raise cattle and horses, so that when the game is gone you will be prepared to live independently of it." Tribes Ex. OCS-24, at 82.

[27] Because of the language of the treaty itself and the "ample evidence and testimony addressed," the Wyoming Supreme Court had "no difficulty affirming the findings of the district court" that the Reservation's purposes were solely agricultural. Pet. App. A, p. 38a. The Wyoming Supreme Court was comforted by finding its interpretation to be consistent with that of this Court which held that, taking the Treaty as a whole, its purpose was "to create an independent permanent farming community upon the reservation." *Shoshone*, 304 U.S. at 117-118.

torically irrigated acreage for which water rights long ago had been obtained from the state of Wyoming. The award was made without evidence that, in addition to that available under state rights, water was necessary to meet the Reservation's minimal agricultural needs or to prevent the defeat of its primary agricultural purpose. In addition, the quantification was made without "sensitivity" to its impact on users of other state water rights and to Congress' express deference to state water law. In these respects, the Wyoming Supreme Court's decision is erroneous and should be reversed.

II. The "Practicably Irrigable Acreage" Quantification Standard, Established In *Arizona I*, Should Be Limited In Its Application To Only Those Agricultural Indian Reservations For Which There Is No Other Means To Quantify The Federal Reserved Water Right Necessary To Effectuate Their Primary Agricultural Purpose.

A. Early quantifications under the Federal reserved water right doctrine were based on an agricultural Indian reservation's reasonably foreseeable needs. Where these needs were not foreseeable, this Court established the "practicably irrigable acreage" quantification standard in *Arizona I*.

That the quantification of a reserved water right is limited to that water reasonably necessary for federal purposes is inherent in the tradition and law of the reserved right doctrine. Perhaps the earliest suggestion of the power of the United States to reserve water from appropriation under state law to meet federal needs is found in *United States v. Rio Grande Irrigation Company*, 174 U.S. 690 (1899), hereinafter "*Rio Grande*."[28]

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[28] In *Rio Grande*, in a statement which was a precursor to the eventual elaboration of the reserved right doctrine, the Court made it clear that "a State cannot, by its legislation, destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its water; so far at least as may be necessary for the beneficial uses of the government property." 174 U.S. at 703.

A few years later, in a matter arising out of the ninth circuit, this Court made its first definitive statement of the reserved right doctrine in *Winters*. By refusing to accept the contention that the Indians of the Fort Belknap Reservation relinquished the waters which would make the Reservation "valuable or adequate" for its agricultural purpose, the Court established that the reserved right should be based on a reservation's need.[29] Thereafter, the ninth circuit frequently based its awards of Indian reserved water rights on reservations' foreseeable needs. When there had been ample opportunity for substantial completion of development on a reservation, e.g., when there had been a long history of irrigation, the foreseeable needs were considered as being identical to historic use. *Conrad Investment Company v. United States*, 161 F. 829 (9th Cir. 1908), hereinafter "*Conrad.*"[30] *United States v. Walker River Irrigation*

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[29] *Winters*, 207 U.S. at 576. The decision of the Court of Appeals in *Winters v. United States*, 143 F. 740 (9th Cir. 1906) did, however, address the scope of the reserved water right when it affirmed the trial court's opinion that the United States had "reserved the right to use the waters of the Milk River, at least to an extent reasonably necessary to irrigate" the Reservation's lands. 143 F. at 749. In this context, the Ninth Circuit considered the extent of existing irrigation on the Ft. Belknap Reservation in upholding the reserved water right. 143 F. at 741. While it would perhaps have been inappropriate in 1906 permanently to decree a reserved water right limited to the Indians' then historical irrigation practices, irrigation on the Reservation having begun in only 1898, the Court's affirmation protected existing irrigation alone.

[30] Citing *Winters*, the *Conrad* court determined that the Indians of the Blackfeet Indian Reservation had reserved waters "to the extent reasonably necessary for the purposes of irrigation and stock raising, and domestic and other useful purposes." 161 F. at 831. To an even greater degree than the Ninth Circuit's decision in *Winters*, the Court examined, and limited its order to protection of, existing irrigation on the Blackfeet Reservation. Historical irrigation practices were of primary concern to the Court. 161 F. at 832-834. The *Conrad* court left open its decree for modification, should conditions on the Reservation at any time require such. There is no suggestion in the opinion, however, that modification would be appropriate only if the Indians' needs should increase. Furthermore, as on the Fort Belknap Reservation, irrigation on the

District, 104 F.2d 334 (9th Cir. 1939), hereinafter "*Walker River*," [31] *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956), *cert. denied, sub. nom. Ahtanum Irrigation District v. United States*, 352 U.S. 988 (1957), hereinafter "Ahtanum." [32]

When this court again dealt with the question, it addressed the reserved water rights of five agricultural Indian reservations on the lower Colorado River. Since the future requirements of those reservations were uncertain, the Court rejected the contention that the amount

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Blackfeet Reservation had begun only in 1898, resulting in an irrigation history of only ten years at the time of the *Conrad* decision.

[31] In *Walker River*, the Ninth Circuit continued the practice of limiting Indian reserved water rights to those reasonably necessary to fulfill a Reservation's purpose. Finding that creation of a reserved water right was needed for the agricultural purpose of the Walker River Reservation, the court held "that there was an implied reservation of water to the extent reasonably necessary to supply the needs of the Indians." 104 F.2d at 339-340. As the measure of the Tribe's reasonable irrigation needs, the ninth circuit, noting that "the extent to which the use of the stream might be necessary could only be demonstrated by experience," focused on the historic irrigation practices on the Reservation, which had begun as early as 1886, and which had resulted in irrigation of 2100 acres of land at the time of trial. 104 F.2d at 340. The court accepted the historical irrigation experience of the Reservation as "a fair measure of the needs of the Government" and limited its quantification accordingly. 104 F.2d at 340. *Walker River* presents the natural extension of both *Rio Grande* and *Winters*, upon which it relied, both in the quantification standard which it accepted and the application of that standard by long historical reference.

[32] In *Ahtanum*, the Ninth Circuit added another link to its unbroken analytical chain when it accepted "reasonable necessity" as the applicable quantification standard and when it applied that standard within the framework of the reservation's historical irrigation experience. 236 F.2d at 326. Consequently, the Ninth Circuit refused to limit the reserved water right to serve that reservation acreage under irrigation in 1908, but instead extended the right also to include the Indians' needs "in 1915, when the Indian ditch system had been completed." 236 F.2d at 337. The irrigation system for the Wind River Reservation has been substantially complete since the early 1920's.

of the reserved water right should be measured by the Indians' "reasonably foreseeable needs." *Arizona I*, 373 U.S. at 600-601.

B. The "practicably irrigable acreage" quantification standard in *Arizona I* was necessitated by the facts applicable to the reservations in that case. The standard should not be employed for dissimilar reservations for which needs are demonstrated by historical development and satisfied by state-awarded water rights.

In *Arizona I*, this Court quantified sufficient reserved water to irrigate the reservation's "practicably irrigable acreage." In so doing, the Court was careful to note that this quantification standard was the only "feasible and fair" means to measure the reserved water right for the reservations involved. 373 U.S. at 600-601. For the Wind River Indian Reservation which is now before the Court, however, such a standard is neither feasible nor fair. There are at least three obvious distinctions between the *Arizona I* reservations and the Wind River Indian Reservation. First, unlike the *Arizona I* reservations, the Wind River Reservation is *not* comprised of lands ". . . of the desert kind—hot, scorching sands. . . ." [33] Instead, the Wind River Reservation [34] comprises

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[33] Referring to the five reservations there involved, the *Arizona I* Court, 373 U.S. at 598-599, observed:

> Most of the land in these reservations is and always has been arid. If the water necessary to sustain life is to be had, it must come from the Colorado River or its tributaries. It can be said without overstatement that when the Indians were put on these reservations they were not considered to be located in the most desirable area of the Nation. It is impossible to believe that when Congress [and the Executive created them] they were unaware that most of the lands were of the desert kind—hot, scorching sands—and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised.

[34] In 1905, prior to significant irrigation on the Wind River Indian Reservation, the Commissioner of Indian Affairs described

"the best-watered portion of Wyoming." *Shoshone*, 304 U.S. at 114. Second, unlike the Indians in *Arizona I* who were "put on . . . reservations . . . not considered to be located in the most desirable area of the Nation," the Shoshone had long fought with the Crows for control of the Wind River Valley and, in return for their support of the United States, received the Wind River Reservation as a gift.[35]

Finally, the *Arizona I* reservations were set aside for use "in the indefinite future to satisfy the needs of Indian tribes in the United States as those needs might develop." *Arizona v. California*, Special Master's Report, December 5, 1960, hereinafter "*Arizona I* Master's Report," at p. 262. As a result, Special Master Rifkind concluded, and this Court agreed, that the unforeseeable water needs of future Indian inhabitants of these reservations had to be protected by a large award of water based on the amount "sufficient . . . to irrigate all of the practicably irrigable lands in a Reservation and to supply related stock and domestic uses."[36] The Special Master nevertheless acknowledged, "Whatever might be pos-

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the diminished portion of the Reservation as being ". . . the garden spot of that section of the country. . . ." Wyo. Ex. WRIR I & P 9, at p. 5.

[35] Tr. 9232.

[36] *Arizona I* Master's Report, at p. 262. The special master described his reasoning as follows: "At the times of the creation of the five Indian Reservations in question, it was impossible to predict the future needs of the Indians who might inhabit them. Indeed, in some instances it was not clear which Indian tribes would ultimately be settled on a particular Reservation. What the United States did, in withdrawing public lands for these Indian Reservations was to establish areas that could be used in the indefinite future to satisfy the needs of Indian tribes in the United States as those needs might develop. Only by reserving water in this manner could the United States ensure that the Reservation lands would be usable when needed to support an Indian economy." *Id.* "It is clear that the water rights of the five Reservations in question cannot be fixed at present uses for this would defeat the basic purpose of reserving water to meet future requirements." *Id.*, at p. 263.

sible in a case involving solely the issue of the reserved rights of a single Indian Reservation, it would not be possible to predict future Reservation needs in this litigation." *Id.* at 264-265, footnote omitted.[37] In the case at bar, the Wind River Indian Reservation was set aside *specifically* for the Shoshone Indians. Only later were the Arapaho forcibly relocated to the Reservation, an injustice for which the Shoshone were eventually compensated by the United States. *Shoshone Tribe of Indians v. United States*, 299 U.S. 476 (1937). Consequently, the "practicably irrigable acreage" quantification standard of *Arizona I* should not be universally applied to all agricultural Indian reservations, particularly those which do not fall into the peculiar circumstances of the five *Arizona I* reservations.

The *Arizona I* dispute was again addressed by this Court in *Arizona v. California*, 460 U.S. 605 (1983), hereinafter *Arizona II*, in which the United States and Tribes sought an increase in their reserved water right. The States, on the other hand, suggested that the Court should reconsider the "practicably irrigable acreage" standard. To preserve the certainty of its previous decree *in that case*, this Court refused to reopen the quantification issue.[38] By foreclosing relitigation of the "prac-

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[37] In that footnote he stated, "Even in such cases, courts have not attempted to bind the Indians on the basis of a prediction as to future needs." *Conrad*, which is discussed at note 30, above, refused to limit the Indian reserved right to historical use when the period of historical use had been quite short, only 10 years. In contrast, on the Wind River Indian Reservation, there has been full irrigation development at present levels for at least sixty years.

[38] "We also fear that the urge to relitigate, once loosed, will not be easily cabined. The States have already indicated, if the issue were reopened, that the irrigable-acreage standard itself should be reconsidered in light of our decisions in [*New Mexico, supra, Fishing Vessel, supra*], and we are not persuaded that a defensible line can be drawn between the reasons for reopening this litigation advanced by the Tribes and the United States on the one hand and the States on the other. It would be counter to the interests of all parties to this case to open what may become a Pandora's Box,

ticably irrigable acreage" quantification standard, based on concepts of *res judicata* applicable in that case, this court did not preclude reconsideration of whether that quantification standard should be applied to other agricultural Indian reservations existing under different contemporary and historical circumstances.

C. To resolve the confusion over the reserved water right quantification standard for agricultural Indian reservations, this Court should limit the applicability of its holding in *Arizona I* to those agricultural Indian reservations for which the practicably irrigable acreage standard is the only measure of the amount of water needed for the reservations' primary agricultural purpose.

Because of the apparent distinction between the reserved water right quantification standard announced in *Arizona I* and *II* (practicably irrigable acreage) and that more recently announced in *New Mexico* (necessity), understandable confusion exists in the courts below over the standard which now should be applied to agricultural Indian reservations. For example, at the urging of the United States, the Claims Court recently hedged its bets in concluding that "practicably irrigable acreage" *is* the standard, *but* that the standard is now subject to a "restrictive interpretation" based on concepts of necessity. *White Mountain Apache Tribe of Arizona v. United States*, 11 Cl. Ct. 614, 626 (1987). The Wyoming Supreme Court, on the other hand, analyzed this Court's decisions, failed to find any such "restrictive interpretations," and concluded that *Arizona II* conclusively reaffirmed the original "practicably irrigable acreage" standard announced in *Arizona I*, without regard to any concepts of necessity.[39]

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upsetting the certainty of all aspects of the decree. These considerations, combined with the practice in our original cases and the strong res judicata interests involved, lead us to conclude that the irrigable-acreage question should not be relitigated." *Arizona II, supra*, 460 U.S. at 625-626.

[39] Pet. App. A, p. 47a: The Wyoming Court held: "The measure of the Tribes' reserved water right is the water necessary to irrigate

In the absence of clarification and resolution by this Court, the confusion already apparent in the lower courts will inevitably expand. The Court should take this opportunity to unequivocally explain that the "practicably irrigable acreage" standard was adopted for the *Arizona I*, reservations and that it has no applicability to any other agricultural Indian reservation, *unless* it can be demonstrated that the standard provides for the quantification of only that water necessary to meet agricultural minimal needs and to insure that the primary agricultural purpose is not entirely defeated.

III. The "Practicably Irrigable Acreage" Standard For The Quantification Of Federal Reserved Water Rights For Agricultural Indian Reservations Should Be Discarded Since Its Results In Unjustified Windfalls For Indian Reservations, It Disregards This Court's "Sensitivity Doctrine." And Its Inflexibility Carries With It Inherent Problems Of Proof.

The Wind River Reservation in Wyoming enjoys a history of extensive irrigation development pursuant to state awarded water rights. Between 1905 and 1915, pursuant to express Congressional direction, some 145,000 acres of land of the Wind River Reservation were awarded state water rights for the benefit of the Indians. This amount of irrigated land soon proved to be far more than was needed. By 1963, state water rights

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the practicably irrigable acreage on the reservation. In [*Arizona I*], a needs test was rejected as too uncertain, the Court opting instead for practicably irrigable acreage as the measure of a tribal agricultural reserved water right. Two subsequent non-Indian reserved water right cases [*Cappaert, New Mexico*] indicate that necessity is the measure of a reserved water right. And in [*Fishing Vessel*], the Court recognized the propriety of reducing the Indians' proportion of the fish harvest as their needs diminished. Nonetheless, the Court declined the invitation to re-examine the PIA standard in [*Arizona II*] and reaffirmed the value of the certainty inherent in the practicably irrigable acreage standard. The district court was correct in quantifying the Tribes' reserved water right by the amount of water necessary to irrigate all of the reservation's practicably irrigable acreage."

for 40% of that land had been voluntarily relinquished, leaving 87,000 acres under state water rights. Based on the practicably irrigable acreage standard, however, the Reservation's reserved water rights were quantified based on 102,000 acres of irrigable acreage, of which no more than 54,200 acres had *ever* been historically irrigated, though never all in one season. In other words, after the infusion of massive amounts of congressionally mandated expenditures for the construction of irrigation projects, the total historic practicably irrigable land base of the reservation was 54,200 acres. That was land which had been irrigated at least once, but never all at the same time, requiring some 290,500 acre feet of water annually.[40] Nevertheless, under the Wyoming Supreme Court's decision below, the reserved water right awarded was 500,400 acre feet [41] or 72% greater than historical needs. This total amount was awarded in the absence of any evidence showing that the water was necessary to meet the minimal needs of the Reservation or to insure that its primary agricultural purpose was not entirely defeated. The Wyoming courts, misapprehending the "practicably irrigable acreage" standard of *Arizona I*, awarded reserved water rights not only for historically irrigated lands, which were already the subject of state-awarded

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[40] Historic practicably irrigable acres and the reserved water right based thereon were: 37,284 acres and 16,932 acres for which 207,641 acre feet and 82,849 acre feet were awarded, Pet. App. D, pp. 172a, 182a, for a total of 54,221 acres of historic land for which 290,490 acre feet were awarded a Federal reserved water right.

[41] Future practicably irrigable acreage and the reserved water right based thereon awarded by the district court were: 48,097 acres and 423 acres for which 186,990 acre feet and 1,947 acre feet were awarded, Pet. App. D, pp. 172a, 182a, for a total of 48,520 acres of future land for which 188,937 acre feet were awarded as a reserved water right by the district court. The Wyoming Supreme Court reversed a 10% reduction of the future award by the district court, Pet. App. A, pp. 56a-58a, thereby increasing the district court's award by 20,993 to 209,930 acre feet. The total award by the Wyoming Supreme Court, for both historic and future acreage, was 500,420 a.f.

water rights, but also for yet to be constructed "future" projects which were designed solely for the purpose of obtaining the quantification of reserved water rights in this adjudication.

This drastic result is in stark contrast to the decisions of other courts which have dealt with Indian reservations on which there has been ample time to reach full irrigation development. For example, the Ninth Circuit has twice addressed the quantification standard for the reserved water right for an agricultural Indian reservation for which there is a lengthy history of irrigation development. On the Walker River Indian Reservation in Nevada, there had been no showing of "the *necessity* or demand for the cultivation of a larger area than 2,100 acres," for which 26.25 second feet of water was found to be sufficient. *Walker River*, 104 F.2d at 340. The Ninth Circuit consequently limited the reserved water right to that precise amount "as a fair measure of the needs of the government as demonstrated by seventy years' experience." *Id.*, at pp. 339-340.[42] On the Yakima Indian Reservation in the State of Washington, the United States entered into an agreement with neighboring non-Indian irrigators in 1908 which limited the Indians' use of water from Ahtanum Creek. The Ninth

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[42] The Ninth Circuit stated: "We hold that there was an implied reservation of water to the extent reasonably necessary to supply the needs of the Indians. There remains for decision the question as to the quantity to which the United States is entitled. The problem is one of great practical importance, and a priori theories ought not to stand in the way of a practical solution of it. The area of irrigable land included in the reservation is not necessarily the criterion for measuring the amount of water reserved, whether the standard be applied as of 1859 or as of the present. The extent to which the use of the stream might be necessary could only be demonstrated by experience. . . . We are constrained to accept this estimate [26.25 c.f.s.] as a fair measure of the needs of the Government as demonstrated by seventy years' experience. . . . So precious is every miner's inch of water in these parched regions that no arrangement should be countenanced which would encourage waste or tend to induce it." *Walker River*, 104 F.2d at 339-340.

Circuit felt constrained to uphold the validity of the agreement but, nevertheless, described the Indians' reserved water right as being in that amount required to provide for the Indians' reasonable needs, as measured upon the completion of the Reservation's water project. *Ahtanum*, 236 F.2d at 337.

A. The "practicably irrigable acreage" quantification standard creates a windfall for the United States as well as for agricultural Indian reservations.

The Wyoming Supreme Court, based on *Winters*, awarded reserved water rights for the Wind River Indian Reservation, notwithstanding express Congressional deference to Wyoming law in 1905 for the acquisition of the Reservation's irrigation water rights and Congress' refusal expressly to reserve water for the Reservation.[43] In 1963, however, the United States acquiesced in the expiration of a substantial portion of those Wyoming water rights, leaving some 87,000 acres to be irrigated under Wyoming state law. In the instant adjudication, which commenced in 1977, the United States claimed and was awarded reserved water rights based on over 100,000 acres of practiably irrigable acreage, much of which was already the subject of state-awarded water rights acquired pursuant to the 1905 Act.

If that surrender was of state water rights needed by the Reservation, the subsequent award of Federal reserved

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[43] In deliberations preceding the Act of March 3, 1905, ratifying the 1904 Agreement between the United States and Tribes, Congress *expressly* directed that all actions be taken "as are required by the statutes of the State of Wyoming in securing water rights from said State" for the Reservation. Pet. App. X, p. 772a. Accordingly, water rights under Wyoming law were subsequently acquired by the United States for the irrigation of some 145,000 acres on the Reservation. In 1914, the Office of Indian Affairs unsuccessfully requested that Congress specifically create reserved water rights for the Reservation. The proposed creation of reserved rights was said to be necessitated by the Act of March 3, 1905, 33 Stat. 1016, 1020, which "practically nullified" the applicability of the *Winters* decision to the Reservation.

water rights represents a remarkable and undeserved benefit to the United States. In effect, rather than compensating the Indians for state water rights which were lost, the United States sought and now has been awarded an even more senior reserved water right to irrigate yet more land, thereby shifting the economic loss from the public treasury to formerly senior water users under Wyoming laws.[44]

The award of reserved water rights represents a substantial windfall to the Tribes as well. There is no evidence that *any* reserved water is necessary to ensure that the Reservation's primary purpose is not entirely defeated. Since the record is also devoid of any evidence that the Tribes complained of the surrender of 40% of their state-awarded water rights, it can only be presumed that the water they produced was not needed.[45] In light of the Tribes' cross-petition filed in this matter,[46] little argument remains that the amount of the reserved water right award was far in excess of the Reservation's minimal needs. The Tribes presented the following question to the Court:

> Whether, under the Treaty, the Tribes are restricted from exporting their reserved water off the Reserva-

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[44] The Federal reserved water right doctrine ". . . is not a source of power authorizing of itself any federal action; its only function is to shield the United States from payment of compensation to persons whose water rights are seized and impaired by the federal government in future exercises of the reserved right." Trelease, F. *Federal-State Relations in Water Law, Legal Study Number 5*, National Water Commission, September 1971, p. 256.

[45] In this connection, it is not surprising that the state district judge observed the reserved water right claim "demonstrates to the court an avaricious appetite on the part of the tribes for practically all of the water in the Big Horn River system." Pet. App. F, p. 221a.

[46] *Shoshone Tribe and Northern Arapaho Tribe of the Wind River Indian Reservation v. The State of Wyoming, et al.*, No. 88-492, Cross-Petition for a Writ of Certiorari to the Supreme Court of Wyoming, September 21, 1988, hereinafter "Tribes' Cross-Petition, upon which the Court has not yet acted."

> tion for use by themselves or by others or rather, consistently with the rights enjoyed by all other water users in Wyoming, they may export their reserved water off the Reservation.

In support of their cross-petition on this question, the Tribes complained of the Wyoming Supreme Court's affirmation of a portion of the state district court's decree providing that "the use [as well as the sale of reserved water] is confined to the reservation." Tribes' Cross-Petition, p. 22. It is difficult to imagine that the very same water which the Tribes openly seek to export for sale can be said to be necessary to satisfy the Reservation's "minimal needs" or to insure that the Reservation's primary agricultural purpose is not "entirely defeated." The Tribes suggest that such an exportation would lead to more "efficient use of this scarce resource" in that it would provide a source of money. Tribes' Cross-Petition, pp. 25-26. This Court has previously observed that reserved water rights were created by implication to provide only "an apportionment to the Indians of enough water to meet their subsistence and cultivation needs." *Fishing Vessel*, 443 U.S. at 684. The Tribes have now elevated this purpose to the need for cash which can be raised by the sale of excess[47] water, presumably to those who previously used it.

Moreover, from the Tribes' perspective, there has simply been an exchange of state water rights for Federal reserved rights. In so doing, a valuable set of rights has

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[47] The United States itself has recognized that the reserved water doctrine does not entitle Tribes to excess water:

> Under the Winters Doctrine, the needs of the plaintiff Indians are not for an excess amount of water which would assure them lives of indolence in contrast to lives exemplifying habits of industry and thrift.

Gila River Pima-Maricopa Indian Community v. United States, before the Indian Claims Commission, Docket No. 236-C, Defendant's Objections to Plaintiff's Requested Findings of Fact; Defendant's Requested Findings of Fact; and Brief on Loss of Use of Water, April 1978, at 302.

been traded for an invaluable one. The rights received are no longer subject to the limitations of state law regarding continued use (without which they would be subject to abandonment) or transfer to different uses[48] (for which there may be no injury[49] to other water users). Such a transfer would defeat this Court's admonition in *New Mexico* that water rights for secondary uses should be obtained under state law. Furthermore, relief from state law surely was not intended by Congress when it directed that state water rights be obtained for irrigation on the Reservation—at the same time that

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[48] For example, as claimed, the reserved water right included in-stream flows of up to 6,000 c.f.s. for fisheries, wildlife and aesthetic purposes, an amount which would completely curtail all upstream diversions. This claim was denied and the United States and Tribes sought to amend the judgment in that regard. Although the proposed amendment was rejected, the district court held that once the reserved water right is quantified for irrigation, it arguably may be used for virtually any purpose on the Reservation so long as the consumptive use is not increased. Amended Judgment and Decree, May 24, 1985, Pet. App. D, p. 183a. *See also* Order Ruling on Motions to Alter or Amend the Decision of May 10, 1983, Pet. App. E, p. 194a. While the prohibition on any increased consumptive use may appear to be ample protection, it is important to remember that new uses may be non-consumptive, yet quite injurious to other users. For example, if the Tribes convert their reserved water right into the very fisheries flows for which a reserved water right was rejected, those fisheries flows would have the effect of eliminating diversions by other water users above and within the Reservation. Pet. App. F, pp. 259-260a.

[49] In their cross-petition, the Tribes pledge to transfer their water rights under "restrictions similar to those imposed by state law." This, according to the Tribes, "means that the Tribes entitlement to export water should be limited only if such exportation would cause other water users to be 'worse off than they would have been if the rights had been exercised for their original use at the original place." Tribes' Cross-Petition, n.16, p. 25. Such an approach would make sense if the entirety of the reserved right actually *had* been exercised. As a practical matter, however, roughly one-half of the right (that associated with "future" projects) has *never* been exercised. It is difficult to understand how that unexercised right could be transferred, then actually used for the first time, without injuring other water users.

a large portion of former Reservation lands were opened to entry by non-Indians who also were to obtain state water rights. Nevertheless, the award below has substituted the Federal reserved right's 1868 priority date for the 1905-15 priority dates of the state water rights. Since the Tribes now have the most senior water right on the Wind River, they have been vaulted ahead of the state water right priorities held by their non-Indian neighbors. In other words, instead of remaining as part of an integrated system of water right priorities, the Tribal members will receive water ahead of their neighbors who hold priorities which were formerly senior or equal to those of the Indians.

As a practical matter, the elevation of the Tribes' priority results in substantially more water being available to them. For example, during the summer of 1988, following entry of the decree below, non-Indian water users taking water from the same ditches as their Indian neighbors were shut down for the benefit of the Indian water users. In addition, to foreclose the same eventuality during the coming irrigation season, the State of Wyoming agreed to pay five million dollars, in return for the Tribes' promise not to exercise their reserved rights for one year. Whether viewed in the context of increased flexibility for their water rights, an increased amount of water received, or the ability to convert their water rights to money, the Tribes have undeniably received a windfall.

B. The "practicably irrigable acreage" quantification standard disregards the "sensitivity doctrine" established by this court and, as a result, causes significant dislocation of water rights established under state law.

This Court is keenly aware of the immense damage which the quantification of an implied reserved water right can cause to existing water uses under state law. "In the arid West . . . claims to water for use on federal reservations inescapably vie with other public and private claims for the limited quantities to be found in the

rivers and streams." *New Mexico*, 438 U.S. at 699. The evidence in this case graphically demonstrated this conflict, moving both the master and the district court to acknowledge that damage to state-awarded rights would be occasioned by their recognition of a reserved water right for the Reservation.[50]

As one means of lessening the taut and harmful grip that reserved water rights can have upon Western water users, this Court has demanded that courts proposing to quantify a reserved water right conduct a "careful examination" of a reservation's minimal water needs "both because the reservation is implied, rather than expressed, and because of the history of Congressional intent in the field of federal-state jurisdiction with respect to allocation of water." *New Mexico*, 438 U.S. at 700-701. When quantification of a reserved water right will reduce supplies available for water-needy state and private appropriators, this result must be a variable in the quantification equation. *New Mexico*, 438 U.S. at 705. This aspect of the law of federal reserved rights came to be referred to below as the "sensivity doctrine," from Mr. Justice Powell's dissent in *New Mexico*.[51]

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[50] Among the master's twelve findings of fact devoted to this issue was finding I.2.: "Today owners of water rights in Division 3 may suffer damages from an inability to put their rights to full use following the emplacement of an 1868 priority date for Indians in the upper reaches of the Wind River." Pet. App. H, pp. 688a-690a. *See also id.*, at 623a-630a. The district court reacted equally strongly in finding of fact 98: "The Court finds that the construction of any one or all of the future projects would have an adverse effect on other water users." Pet. App. F, p. 258a. This finding was inexplicably deleted by subsequently assigned District Judge Alan B. Johnson, sitting after the retirement of Judge Harold Joffe, who had written the district court's opinion and order, in spite of the Master's findings and in spite of the fact that no party had requested its deletion upon rehearing. Pet. App. D., p. 169a. While the finding was deleted, no contrary finding was substituted. Rather, the subject of injury was simply ignored.

[51] "I agree with the Court that the implied-reservation doctrine should be applied with sensitivity to its impact upon those who have obtained water rights under state law and Congress' general policy of deference to state water law." *New Mexico*, 438 U.S. at 718.

Consequently, *New Mexico* teaches that quantification of a reserved water right must reflect the circumstances surrounding the reservation for which quantification is sought. A reviewing court must consider whether the right is express or implied, whether there is evidence of Congress' traditional intent to defer to state water law, whether the right sought goes beyond the minimal needs of the reservation, and whether quantification will damage water-needy state and private appropriators. Unfortunately, unflagging application of the practicably irrigable standard of quantification makes application of the "sensitivity doctrine," or any other rule of tailored consideration of an individual reserved water right claim, difficult in theory, if not impossible in practice. The practicably irrigable standard, appropriate as it may have been for quantification of the historically unproven needs of the reservations in *Arizona I*, is driven by a single factor, the amount of land which may be "practicably irrigated" upon an agricultural Indian reservation. As such, it is by its very nature rigid and unresponsive to consideration of the reasonable needs [52] of a reservation or of surrounding state and private users or of the reservation's historical irrigation experience.

After *New Mexico*, those Courts which have relied upon the "practicably irrigable acreage" standard have invariably applied it mechanically, without consideration of the careful examination called for by *New Mexico*.[53]

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[52] *See Arizona I*, 373 U.S. at 600-601, rejecting application of a need-based analysis in that case.

[53] The PIA standard has been applied at least four times (excluding the decision below) since *New Mexico*. *United States v. Anderson*, 736 F.2d 1358, 1361 (9th Cir. 1984); *United States v. Adair*, 723 F.2d 1394, 1415-16 (9th Cir. 1983); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981); *Montana v. Confederated Salish and Kootenai Tribes*, 712 P.2d 754, 764 (Mont. 1985). In not one of those decisions was there discussion that *New Mexico* required a less formalistic and more tailored approach to quantification than the practicably irrigable acreage standard

Instead, the courts have been more likely to assert that *New Mexico* does not apply to Indian reserved water rights,[54] despite *New Mexico*'s obvious reliance upon this Court's decisions in *Winters* and *Arizona I* to justify the "careful examination" called for by *New Mexico*. For its part, the Wyoming Supreme Court rejected the "needs test . . . as too uncertain." [55] To its credit, the Wyoming court did address the applicability of *New Mexico* to the quantification in question here, unfortunately concluding that *New Mexico* did not clearly apply.[56] Going on to assume that it might, the court further concluded, contrary to both the Master and the district court,[57] that sufficient sensitivity to state and private users had been shown by the court's announcement of a single agricultural purpose for the Reservaiton and by the court's rejection of certain lands claimed as "practicably irrigable acreage" by the United States and Tribes. Pet. App. A, p. 72a. Nowhere in the court's opinion is there a careful examination of whether the reserved right was express or implied, of evidence of

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presupposes. It was sufficient, having found an agricultural purpose, rotely to rely upon practicably irrigable acreage without more as the single basis for quantification.

[54] *See United States v. Adair*, note 53, above, 723 F.2d at note 13 and accompanying text.

[55] Pet. App. A, p. 47a, relying upon *Arizona I*.

[56] Pet. App. A, p. 70a-71a.

[57] In recognition of the inevitability of damage to state users which would result from this case, the Master limited the Tribes' development of their future projects only to no more than 10% of the total in each decade following the decree unless storage were put in place to provide water needed by Indian and non-Indian users. Pet. App. H, p. 584a. The district court prohibited construction of any future projects until such storage was in place. Pet. App. F, p. 235a-236a. The storage limitation was, however, eliminated by the subsequently assigned Judge Johnson upon rehearing. Pet. App. B, p. 169a.

deference to state law, or of the degree of injury to be suffered state users within the context of *New Mexico*.[58]

The decision of the Wyoming Supreme Court stands as testimony to brittle judicial adherence to the "practicably irrigable acreage" standard depite the teachings of *New Mexico*. While the district court made an effort to quantify the Tribes' rights with sensitivity by imposition of the storage requirement,[59] the Wyoming Supreme Court was unable to square *New Mexico* with the practicably irrigable acreage standard. Its substitute was to suggest that certain findings, compelled by law and facts unrelated to the careful examination called for by *New Mexico*, fulfilled the court's obligation to quantify the reserved water rights with sensitivity, all in spite of the fact that the reserved right below was implied, that the 1905 Act evidences an obvious example of Congress' deference to state law, that state and private users would be damaged by the quantification, and that the quantification will result in a windfall for the Tribes.

C. The "practicably irrigable acreage" quantification standard's inflexibility results in inherent problems of proof which divert the trial courts from apportioning water to meet the Indians subsistence and cultivation needs.

Because the "practicably irrigable acreage" quantification standard establishes a maximum amount on the Indian reserved water right, it is unavoidable that the evidence presented by the Tribes, and the United States on their behalf, is calculated to maximize the amount awarded. The evidence is restrained only by the creativity of counsel and expert witnesses. Instead of focus-

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[58] In spite of the findings below, the Wyoming Supreme Court mechanically concluded that there was no indication that there would be a gallon-for-gallon reduction in supplies to non-Indian users by quantification of the reserved water rights. Pet. App. A, p. 71a.

[59] *See* note 57, above.

ing on the "apportionment to the Indians of enough water to meet their subsistence and cultivation needs," required by *Arizona I* and by *Winters*, as interpreted in *Fishing Vessel*, 443 U.S. at 684, the overwhelming temptation is to simply maximize the amount of land which may be irrigated on the reservation. In fact, in the adjudication below, adherence to *Arizona I*'s practicably irrigable acreage standard, induced the state court master to observe that he had a "duty" to find practicably irrigable acreage on the Wind River Indian Reservation [60] and that he found it "incredible" that there might not be future irrigation projects which were economically feasible.[61]

As demonstrated by this case, the simple-sounding concept of "practicably irrigable acreage" is one which is difficult to define. Eventually, the parties stipulated to a factual definition of "practicably irrigable acreage" as being, "those acres susceptible to sustained irrigation at reasonable costs." [62] Pet. App. F, p. 229a. The trial

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[60] Tr. 8906. The Master stated, ". . . I'm going to have the duty to search for some rationale to justify a practicably irrigable acre on this Reservation, and I'm not going to find it in the history of the Bureau of Reclamation, I don't think."

[61] The Master, frustrated by the state's position that none of the future projects was economically feasible under discount rates normally used by the United States, stated, "I find it incredible that an economic or sensitivity analysis could conclude that not a single acre of the future lands claimed is economically feasible!" Pet. App. H, p. 579a. In very nearly the same breath, however, the Master also opined that "in the real world of today's interest and inflation and uncertainty of agriculture, doubt exists that much of the 'futures' land may ever be a part of any newly constructed project." *Id.* at 584a.

[62] In *Arizona I*, this Court's master used "practicably irrigable" as meaning "that quantity of water . . . required to make the Reservations livable." In *Arizona II*, the new master defined the term as "economically feasible." Report of the Special Master, *Arizona v. California*, No. 8 Original (Feb. 22, 1982), hereinafter "*Arizona II* Master's Report," pp. 90, 94.

court further defined "sustained irrigation" as "[t]he ability of a soil to produce a relatively high yield of crops under irrigation over a long period of time without deterioration." Pet. App. H, p. 715a.

Based on the elegant simplicity of these definitions, the Wyoming Supreme Court affirmed an award of a reserved water right in the total amount of 500,420 a.f. per annum, being comprised of 290,490 a.f. for 54,221 acres of "historic" lands and 290,930 a.f. for 48,520 acres of "future" project lands. In general, the amount of the award below for the Wind River Indian Reservation was greater than that for any of the *Arizona I* reservations, except for the massive Colorado River Reservation. *Arizona I* Master's Report, at p. 272.

For the "historic" lands, the Wyoming courts fashioned a presumption that if the lands were the subject of a state-awarded water right they were practicably irrigable. The resulting 54,221 acres have never been collectively irrigated during any one year. Instead, they comprised all such lands which had ever been irrigated since the reservation was established, together with lands [63] which could be irrigated in the future by the extension of existing irrigation ditches. Nevertheless, the annual amount of the reserved water right based on the historic lands allows them all to be simultaneously irrigated. The ultimate result was simply to exchange state-awarded water rights (which Congress had directed be obtained by the Indians) for Federal reserved water rights. As previously described, the practical effects of that swap are immense.

For the "future" project lands, which had never been irrigated and which, for the most part, had been restored to the reservation for grazing purposes, *see* page 6, supra, the stipulated definition was applied insofar as it

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[63] These lands, treated similarly to "future" project land, were known as "Type VIII." Pet. App. H, p. 500a.

could be without the experience of actual irrigation. As a result, the United States assembled a team of experts to determine which lands on the Reservation were arable, which of the arable lands could be irrigated feasibly from a physical or engineering standpoint, and which of those lands were economically feasible to irrigate. In general, as represented to the trial court,[64] this process is conceptually identical to that employed by the United States Bureau of Reclamation.[65] While petitioner fully understands that this Court does not review the factual findings of state courts and while the state court master found the evidence of the United States to be "professional and persuasive," the type of evidence which was used below to quantify the reserved water right demonstrates the extent to which the term "practicably" can be stretched. The Court will undoubtedly be told by *amici* that quantification based on "future" projects is nothing more than speculation, supported by merely hypothetical projects. The facts of this case confirm such

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[64] In its counsel's opening statement to the trial court below the United States advised, "This is how the United States, and I might add, most other, if not all other in this country, major irrigation planners go about establishing whether or not land is capable of sustaining irrigation. This we did." Tr. 42.

[65] The United States, acting through the United States Bureau of Reclamation (USBR), has a long history of soil and land investigations throughout the United States and within the Wind River Basin. From 1917 through 1978, USBR conducted nine soil and land investigations of varying detail pertinent to irrigated agriculture within the Wind River Basin. Joint Appendix VII-431. U.S. Ex. WRIR C-43 (pp. 4-5); Wyo. Exh. WRIR SF-1 (pp. 14-15). That experience resulted in standards which, until this adjudication, the United States was content to follow as reliable, economically sound indicia of which irrigation projects were worthy of development. The Bureau of Reclamation's work has long been recognized as, and continues to represent, the state-of-the-art in land classification work for determining arability and irrigability. As such, they represent the most widely used and accepted methods for irrigation development. Tr. 3487, 10821-22.

assertions[66] and highlight the fact that few litigants, aside from the United States, can afford to participate in the process.

In identifying arable lands for this adjudication, the United States strayed far from the Bureau of Reclamation methodology by using more inclusive definitions, a lower study intensity, and reduced standards for arability. In addition, the United States frequently failed to apply even its own standards, with the result that all future projects included non-arable lands. In fact, for the purposes of this adjudication, the United States classified as arable some 26,275 acres which previously had been classified as *non*-arable by the Bureau of Reclamation.[67] The practical upshot of this exercise was that the Wyoming courts awarded reserved water rights based on a study intensity upon which the United States, acting through the Bureau of Reclamation, would not otherwise rely for actual project development.[68]

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[66] The former Wyoming State Engineer testified that the projects were "far beyond the realm of ordinary feasibility," Tr. 12168, while the former State Soil Scientist, U.S. Soil Conservation Service, testified that the physical inquiry upon which the projects were based was "wholly inadequate." Tr. 10634.

[67] The USBR had previously made extensive investigations of arable land on the reservation. The area so investigated overlapped with the investigation made by the United States in this adjudication. Within that common area, the United States classified as arable some 26,275 acres which previously had been classified as *non*-arable by the USBR. A comparison of the level of intensity explains the difference. For example, in the area of common agreement, there was one soil test hole per 70 acres of study area. In the area of disagreement, however, there was an intensity of only one test hole per 360 acres. In other words, the intensity of the United States' investigation was less than one-fifth that of the USBR. Nevertheless, the United States' classified the same 26,275 acres as arable for this adjudication which the USBR previously had classified as nonarable. Wyo. Exh. WRIR SS-9.

[68] Before construction begins on a USBR project, a *detailed* investigation must be made. Wyo. Exh. WRIR SK-5 (Ch. 4, ¶ 115.4.2). The arability investigation by the United States, in this adjudica-

In determining engineering feasibility, the United States relied on the most advanced current technology available, rather than irrigation practices existing in 1868 when the Reservation was created.[69] In establishing the economic feasibility of the projects, the United States dramatically departed from the Bureau of Reclamation approach by reducing the discount rate, to levels far below those which the United States would use in deciding whether actually to build the projects,[70] increas-

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tion, was styled as being a "modified semi-detailed" study. Tr. 1108. This approach must be contrasted with the various categories of arability studies normally conducted by the USBR which recognizes three levels of land classification, differentiated by the amount of detail and the accuracy of results: reconnaissance, semi-detailed and detailed investigations. Wyo. Exh. WRIR SK-4 (Ch. 2.6).

[69] If judicial quantification of the implied reserved water right is to effectuate Congress' intent in 1868 when the Reservation was created, it would seem only reasonable that technology used to quantify the right would be of the same date. Nevertheless, the state court master agreed with the United States' use of current technology, stating "My reading of [*Arizona I*] supports the view that the evidence of "practicable irrigability" was determined by then current standards. Judge Elbert P. Tuttle, Special Master in the 1982 re-hearing, concludes that 'the determination of practicable irrigability should be based on present standards. Reference to past standards would introduce an additional complication in an already complex case.' I agree and find accordingly." (footnote omitted) Pet. App. H, p. 535a.

[70] Although the "future" projects would be admittedly financed by the United States, Tr. 5078, the discount rate used by the United States and accepted by the Wyoming courts was inconsistent with and violated the provisions of Federal law dictating the discount rate to be used in the formulation and evaluation of federal water projects. 42 U.S.C. § 1962d-17(a). That section requires the use of the discount rate annually determined by the Water Resources Council which was 7⅛% for 1979, the year for which all costs were valued at trial. Tr. 6071, 42 Fed. Reg. 62116 (1979). The results of the United States' own analyses showed that none of the pro-

ing crop yields, accelerating the time for full production of the projects,[71] reducing their production costs, and reducing management and labor costs.[72]

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posed projects were feasible at discount rates of 7% or greater and that the discount rate must be below 5% for all five projects to be feasible. U.S. WRIR C-274, Wyo. Exh. WRIR ED-100. The United States began its pretrial feasibility analysis using a rate of 7⅛%, the rate then recommended by the Water Resources Council for federally-funded projects. At that discount rate, however, none of the projects, even using reduced component costs adopted by the United States, were feasible. Although it is standard procedure to continue to use the rate in effect at the time a benefit/cost analysis is done, Tr. 6073, the United States then changed its discount rate from 7⅛% to 4%, Tr. 5042, and, later, from 4% to 2%. Tr. 5049. Once again, as with respect to its arable land analysis, the United States disregarded those specific standards which are applicable to all other evaluations of water projects by the federal government. Furthermore, in *Arizona II*, the state parties and the United States' both used discount rates of 7% and 7⅛%, respectively, in their analysis. *Arizona II* Master's Report, at p. 165. In addition, the discount rate applied by the Water Resources Council has steadily risen since 1979. For 1988, it was 8 5/8%. At no time since 1979 has the Council's discount rate ever been as low as 7⅛%.

[71] The United States' feasibility analysis was based on *immediate* full production in each of the projects, Tr. 5870-71, in spite of uncontroverted evidence that, for existing producers in the Reservation area, up to ten years were required to reach full production after project initiation, Tr. 14991, and that in the recent *Arizona II* hearing, the Special Master used reduced yields over a three to five year period for all major cash crops considered. *Arizona II* Master's Report, at pp. 306-315.

[72] The United States' feasibility analysis admittedly included management and labor costs at a level far below those which would actually be incurred. Because of unemployment levels on the Reservation, the United States assumed that management and labor personnel for the future projects would come from the ranks of the unemployed, and as a result, *included only 20% of actual management and labor costs in its feasibility analysis*, based on 45% unemployment on the Reservation. Pet. App. H, p. 569a.

It is small wonder that the state-court master[73] and the dissent in the Wyoming Supreme Court[74] were doubtful that the "future" projects would ever be built. Their skepticism was overcome, however, by their belief that, under the practicably irrigable acreage of *Arizona I*, they were without the discretion to review the evidence based on the concepts normally available to triers of fact, pragmatism and reasonableness. For this reason alone, the "practicably irrigable acreage" quantification standard should be rejected for universal application to agricultural Indian reservations. As described below, it should be replaced by a flexible approach which allows trial courts to tailor the reserved water right to meet

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[73] "As it is now, it appears that no matter what benefit-cost ratios are arrived at, or discount figure used, in the real world of today's interest and inflation and uncertainty in agriculture, doubt persists that much of the "futures" land may ever be a part of any newly constructed irrigation project." Pet. App. H, p. 584a.

[74] ". . . there should be a pragmatic limitation on the standard for quantification, the practicably irrigable acreage, which would eliminate those lands from the quantification formula which only could be irrigated by the construction of some future water project. . . . * * * . . . there has to be some degree of pragmatism in determining practicably irrigable acreage. It is clear from the majority opinion that there was included in quantifying the water reserved to the Indian peoples lands not now irrigable but deemed to be practicably irrigable acreage upon the assumption of the development of future irrigation projects. I would be appalled, as most other concerned citizens should be, if the Congress of the United States, or any other governmental body, began expending money to develop water projects for irrigating these Wyoming lands when far more fertile lands in the midwestern states now are being removed from production due to poor market conditions. I am convinced that, because of this pragmatic concern, those lands which were included as practicably irrigable acreage, based upon the assumption of the construction of a future irrigation project, should not be included for the purpose of quantification of the Indian peoples' water rights. They may be irrigable academically, but not as a matter of practicality, and I would require their exclusion from any quantification." Pet. App. A, p. 84a.

the needs of individual reservations' primary agricultual purpose.

IV. The "practicably irrigable acreage" quantification standard should be replaced with a tailored approach under which the conditions existing on each agricultural Indian reservation are evaluated in determining the amount of the Federal reserved water right which is necessary to meet the reservation's minimum needs and to ensure that its "primary purpose" is not "entirely defeated."

The "practicably irrigable acreage" quantification standard for Federal reserved water rights should be replaced by a tailored approach which can be adapted to the needs associated with the primary purpose of agricultural Indian reservations. As this Court stated in *Cappaert*, reserved water rights must be "tailored . . . to minimal need." 426 U.S. at 141. In addition to ensuring that minimal needs are met, the trial courts should also be at liberty to award reserved water rights in amounts: that are calculated to insure that a reservation's primary purpose(s) is not "entirely defeated;" that, insofar as possible within the constraints of the primary purpose, provide the reservation's Indians with water necessary to a "moderate" living standard; and, that will be "sensitive" to potential dislocation of state water rights.

In the context of an agricultural Indian reservation, such an approach would be no more difficult for the trial court than the excruciating evidentiary exercise involved in determining practicably irrigable acreage.[75] Although common wisdom holds that the practicably irrigable acreage standard promotes certainty and fairness, there could

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[75] In the action below, in determining practicably irrigable acreage for the Wind River Indian Reservation, the Wyoming trial court and its master conducted ninety-six days of trial, received 1,940 exhibits, and heard the testimony of 46 witnesses. The transcript for this portion of the trial comprised 14,963 pages.

be nothing less certain than the status of the reserved right of 210,000 a.f. for "future" projects which in all probability will never be built. Furthermore, there could be nothing less fair than exchanging Congressionally-mandated state-awarded water rights for Federal reserved water rights, with the attendant injury caused to the holders of other state water rights and the windfall conferred on the Tribes.

Consequently, the Court should announce a "tailored approach" to the quantification of Federal reserved water rights, enabling the trial courts to confirm a reservation's primary agricultural purpose, determine the reservation's agricultural needs, and quantify the amount of water necessary for those agricultural needs. As part of the quantification process, however, trial courts should be directed to consider: the amount of water historically used on the reservation for agricultural purposes; whether the reservation has had an opportunity to fully develop its agricultural industry; and, if it has not, whether there is a quantifiable need for additional water to serve lands which can realistically be expected to be irrigated in the future.[76] In the event that state-awarded rights have been obtained by or on behalf of the Indians, the trial court should determine whether additional Federal reserved water rights are necessary to meet the reservation's agricultural needs. In the context of this adjudication, the foregoing approach would result in an award of reserved water rights for the Wind River Indian Reservation only in an amount which is necessary to ensure that its primary agricultural purpose is not entirely defeated *and* which is not already satisfied by Congressionally-mandated state water rights.

In other words, without violating the principles announced in its earlier cases, this Court can establish an

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[76] With respect to such future lands, the amount of water should be calculated based on successful agricultural technology currently prevalent in the region in which the reservation is located.

approach to quantification which allows trial courts the flexibility necessary to fashion varying awards of water to agricultural Indian reservations in varying circumstances.

It can inevitably be anticipated that Indian tribes will point out that the primary agricultural purpose of their agricultural reservations is now outmoded, i.e. that it may be impossible to generate a moderate living for Indians based solely on agriculture. Where this may be true, relief from that difficult situation is appropriately sought from the Congress or the Executive, whichever established the reservations for agricultural purposes, and not from the Judiciary. As has been long recognized, the reserved right doctrine is a financial doctrine, shifting the burden of providing reservation water from the public treasury to private water users. While that may have become accepted practice with regard to water for the original purpose of the reservation, it has not been true with respect to new purposes to which the reservation may be put. Consequently, if the usefulness of a reservation's original purpose has been outlived, Congress or the Executive should expand the purposes. If the expanded purposes require additional water, a new Federal reserved water right with a recent priority date may be expressly created, or appropriate state water rights obtained. If these prove to be insufficient, public funds may be expended to acquire the existing water rights of others. In any event, water for secondary uses should be obtained under state law. *New Mexico.*

CONCLUSION

The judgment of the Wyoming Supreme Court, insofar as it affirmed the award to the Tribes of a Federal reserved water right based on a quantification established by practicably irrigable acres rather than any concept of necessity should be reversed and remanded with instructions to enter a decree awarding a Federal reserved water right in only the amount of water necessary to irrigate those historically irrigated Indian lands within the Wind River Indian Reservation which are not and have never been awarded state water rights.

Respectfully submitted,

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OCTOBER TERM, 1988

STATE OF WYOMING, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

The State of Wyoming initiated a general stream adjudication in its state courts to determine the nature, extent and relative priority of Indian water rights in the Big Horn River System. The Wyoming courts held that when the United States withdrew the Wind River Indian Reservation from the public domain, it reserved a water right for the benefit of the Reservation's Indian occupants to meet their future agricultural needs. The question presented is whether the Wyoming courts erred in measuring that water right based on the Reservation's "practicably irrigable acreage."

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-309

STATE OF WYOMING, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Wyoming Supreme Court (Pet. App. 1a-119a) is reported at 753 P.2d 76. The district court's amended judgment and decree (Pet. App. 168a-184a), order ruling on motions to alter or amend the decision (Pet. App. 185a-201a), and decision (Pet. App. 202a-279a) are unreported. The special master's report (Pet. App. 367a-717a) and supplemental and final report (Pet. App. 280a-366a) are also unreported.

JURISDICTION

The Wyoming Supreme Court entered its decision on February 24, 1988 (Pet. App. 1a), and it denied petitions for rehearing on April 22, 1988 (Pet. App. 120a). On July 7, 1988, Justice White granted Wyoming's motion for an extension of time, to and including August 20, 1988, in which to file a petition for a writ of certiorari, and Wyoming filed its petition on August 18, 1988. On January 23, 1989, the Court granted the petition for a writ of certiorari limited to Question 2 presented

in the petition. The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

TREATY INVOLVED

The Second Treaty of Fort Bridger, July 3, 1868, 15 Stat. 673, is set out at Pet. App. 793a-803a.

STATEMENT

The Wind River Indian Reservation is the home of the Shoshone and Northern Arapaho Tribes. The Reservation was established through the Second Treaty of Fort Bridger, July 3, 1868, 15 Stat. 673, and was located by mutual consent of the United States and the Shoshone Tribe in the Wyoming Territory, within the present boundaries of the State of Wyoming. It presently consists of approximately 2.5 million acres of varied terrain within the upper reaches of the Big Horn River. Pet. App. 7a-8a, 205a-206a, 533a. In 1977, the State of Wyoming decided to test whether the United States' creation of the Reservation included a federally reserved water right, and it therefore initiated a general stream adjudication in Wyoming District Court to determine the nature, extent, and relative priority of water rights, including Indian water rights, in the Big Horn River System. Pet. App. 11a-12a, 203a-204a. See Wyo. Stat. § 1-37-106 (1977) (Pet. App. 726a-728a). The district court appointed a special master to take evidence, prepare a report, and recommend a decree addressing the Tribes' entitlement. *Id.* at 12a-13a, 204a.

After a lengthy trial, the special master prepared a report (Pet. App. 367a-708a) recommending that the Tribes were entitled to a federally reserved water right of 477,292 acre-feet per year based on agricultural use of the Reservation (*id.* at 693-695a) and a much smaller reserved right based on non-agricultural uses. The district court adopted most of the special master's recommendations and awarded the Tribes 479,427 acre-feet per year based strictly on agricultural use (*id.* at 169a-182a). The Wyoming Supreme Court affirmed most of the district court's rulings and awarded the Tribes 500,717 acre-feet

per year based strictly on agricultural use (*id.* at 53a-72a). In each instance, the Wyoming courts determined the Tribes' reserved water rights for agricultural use through the application of the "practicably irrigable acreage" (PIA) standard—the same standard that this Court employed in *Arizona* v. *California*, 373 U.S. 546, 600-601 (1963) (*Arizona I*). Wyoming, which initially argued that if a reserved water right exists, it should be quantified through the PIA standard, now thinks that this was a mistake.[1]

A. The Creation of the Wind River Indian Reservation

This Court's past decisions describe the creation of the Wind River Indian Reservation. See *Northwestern Bands of Shoshone Indians* v. *United States*, 324 U.S. 335 (1945); *United States* v. *Shoshone Tribe of Indians*, 304 U.S. 111 (1938); *Shoshone Tribe of Indians* v. *United States*, 299 U.S. 476 (1937); see also *Northwestern Bands of Shoshone Indians* v. *United States*, 95 Ct. Cl. 642 (1942); *Shoshone Tribe of Indians of the Wind River Reservation* v. *United States*, 85 Ct. Cl. 331 (1937). The Shoshone Tribe originated as a peaceful nomadic people that hunted game and gathered food throughout an 80 million acre territory that now comprises the States of Colorado, Idaho, Nevada, Utah, and Wyoming. *Northwestern Bands*, 324 U.S. at 340 & n.5. The California gold rush and the Mormon migration brought travelers and settlers to this territory, which led to the depletion of game and resulted in inevitable conflicts. *Id.* at 341. The United States therefore negotiated a series of treaties with the various bands of Shoshone, including the Treaty of Fort Bridger, July 2, 1863, 18 Stat. 685. That treaty established peaceful relations and acknowledged that the Eastern Shoshone claimed the right to occupy a 44 million acre territory that now comprises portions of Colorado, Idaho, Utah and Wyoming.

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[1] We limit our discussion here to the tribal history and the proceedings below that are relevant to the question presented. The briefs in opposition filed by the United States and the Tribes provide additional information concerning the Wind River Indian Reservation and the course of this litigation. See U.S. Br. in Opp. 2-10; Shoshone Br. 1-7.

Shoshone Tribe, 324 U.S. at 341-345; *Shoshone Tribe*, 304 U.S. at 113; *Shoshone Tribe*, 299 U.S. at 485. See Pet. App. 9a, 206a-207a.

As the Wyoming courts explained (Pet. App. 9a, 207a), the close of the Civil War led to an increase in western migration, and the United States found it necessary to negotiate a new treaty that would restrict the Shoshones to a diminished area. The Shoshone Tribe's able chief, Washakie, agreed to cede the Eastern Shoshones' claim of right to occupy 44 million acres in exchange for exclusive occupancy of a far smaller reservation in the Wind River region. *Shoshone Tribe*, 304 U.S. at 113; *Shoshone Tribe*, 299 U.S. at 485; *Shoshone Tribe*, 85 Ct. Cl. at 345. The United States agreed to this exchange—fully recognizing that the Wind River region, which contained "fertile river valleys conveniently irrigable" (*Shoshone Tribe*, 304 U.S. at 114), was "the choicest and best watered portion" of the territory (*ibid.*). See *Shoshone Tribe*, 85 Ct. Cl. at 345-346. The United States and the Shoshone Tribe confirmed this agreement through the Second Treaty of Fort Bridger, July 3, 1868, 15 Stat. 673 (Pet. App. 793a-803a), which set apart the 3,054,182 acre Wind River Indian Reservation "for the absolute and undisturbed use and occupation of the Shoshonee Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them" (Art. II, 15 Stat. 674; Pet. App. 795a). See *Shoshone Tribe*, 304 U.S. at 113.[2]

In spite of the Shoshones' objections, the United States relocated the Northern Arapaho Tribe to the Wind River Indian Reservation in 1878. See *Shoshone Tribe*, 304 U.S. at 114-115;

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[2] The Shoshone-Bannock Tribes were also parties to this treaty; however, they exercised their option under Article II (15 Stat. 674) to select a separate homeland and relocated to the Fort Hall Reservation in what is now the State of Idaho. The water rights of those Tribes, which have a somewhat different historical basis, are not at issue in the instant litigation, but rather will likely be decided in the general adjudication of the Snake River Basin. See *In re the General Adjudication of Rights to the Use of Water from the Snake River Basin Water System*, Civ. No. 39576 (5th Dist. Twin Falls), aff'd, 764 P.2d 78 (Idaho 1988), cert. denied, No. 88-1170 (Apr. 3, 1989).

Shoshone Tribe, 299 U.S. at 486-490. From 1872 to 1934, the Tribes ceded or sold various Reservation acreage, and thereafter they reacquired some of the land. Pet. App. 9a-11a, 207a, 409a-431a. In 1890, some 22 years after the United States' creation of the Wind River Reservation, the State of Wyoming came into being (Act of July 10, 1890, ch. 664, 26 Stat. 222).

B. The Present Dispute

In this phase of the Big Horn River general stream adjudication, Wyoming primarily contested whether the United States, through its creation of the Wind River Reservation, had reserved water rights for the Tribes (Pet. App. 205a, 210-211, 404a-405a, 431a). The Wyoming courts uniformly held that the Second Treaty of Fort Bridger did reserve such rights in order to meet the Indians' future agricultural requirements. See *id.* at 19a-32a, 169a-173a, 211a, 431a-439a. This Court has declined to review that determination and has restricted its review to whether the Wyoming Supreme Court, the district court, and the special master were justified in employing the PIA standard to measure the amount of water that the United States has reserved through the 1868 treaty for the Tribes' projected agricultural needs.

The United States participated in the proceedings below as trustee for the Tribes.[3] It urged that the Second Treaty of Fort Bridger established the Wind River Reservation to provide a permanent Indian homeland and that the Tribes' federally reserved water right should be quantified based on the activities associated with such a homeland, including agriculture, livestock, fisheries and wildlife, mineral development, municipal and industrial uses, and aesthetics. Pet. App. 439a-440a. The United States further submitted that the agricultural portion of this reserved right should be determined, as in *Arizona I*, 373 U.S. at 600-601, through application of the "practicably irrigable acreage" standard. Pet. App. 454a.

[3] The claims filed by the United States on its own behalf were subject to adjudication in other phases of this litigation.

Applying these principles, the United States submitted that the Tribes were entitled to an award of 640,000 acre-feet per year, including 570,304 acre-feet per year of reserved water based on present and future agricultural need. See *id.* at 446a-457a. The Tribes, which participated in the judicial proceedings through retained counsel, basically agreed with the United States' general approach (*id.* at 441a), but they applied the principles differently, resulting in a larger claim (*id.* at 457a-462a).

Wyoming argued, in contrast, that the Wind River Reservation was created solely "to convert the Indians from a nomadic life to an agricultural one" (Pet. App. 440a), and that a reserved water right (if it existed) should be quantified "for domestic, agricultural, and stock watering uses only" (*ibid.*). Wyoming further indicated in the proceedings before the special master that this quantification should be conducted through the use of the PIA standard,[4] and it agreed with the United States and the Tribes that "practicably irrigable acreage" refers to " 'those acres susceptible to sustained irrigation at reasonable costs' " (*id.* at 534). Based on this standard, Wyoming affirmatively asserted that the Tribes were entitled to 323,176 acre-feet per year for present and future agricultural projects. See State of Wyoming's Response to the United States' Statement of Claims App. A at 2 (July 16, 1980).

The special master agreed with the United States and the Tribes that the United States established the Wind River Reservation to create a permanent homeland and that the Tribes' reserved water right should be determined on that basis. See Pet. App. 442a-443a, 643a. With respect to the single most im-

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[4] See State of Wyoming's Response to the United States' Statement of Claims 12 (July 16, 1980) ("Wyoming admits that, if a reserved water right was created on behalf of the Wind River Indian Reservation, it was created solely to provide the Indians living thereon with a supply of water for domestic uses, *for the irrigation of all practicably irrigable land on said Reservation*, and for stockwatering uses.") (emphasis added); State's Proposed Master's Report, Vol. 1, pt. 1, at 34 (Apr. 9, 1982) ("it is Wyoming's contention that the right may be quantified solely as is necessary to irrigate the *practicably irrigable acres* of the unalloted lands continuously held in trust by the United States within the Reservation") (emphasis added).

portant type of use—agriculture—he employed the PIA standard, as defined by the parties, to determine an award for "historic acres" (which are or have been successfully put to use as irrigated farmland) and for "future lands" (which have not been, but could be, successfully put to use as irrigated farmland). See *id.* at 463a-591a, 643-682a. He recommended a total agricultural award of 477,292 acre-feet per year representing 288,355 acre-feet needed to irrigate 54,389 acres of historically-irrigated Indian lands plus an additional 188,937 acre-feet needed to irrigate 48,520 acres of cropland in the "future projects" areas (*id.* at 695a). The special master also recommended recognition of additional, but far smaller, reserved water rights based on non-agricultural needs (*id.* at 696a-702a).

The United States, the Tribes, Wyoming, and some of the private parties filed exceptions with the district court. Wyoming again requested that if a reserved water right existed, it should be limited to the amount necessary to irrigate the Reservation's practicably irrigable acreage.[5] It also advanced, however, an inconsistent statement that the Indian's minimal needs were completely satisfied by their historic usage, which Wyoming estimated would provide each Indian with enough water to irrigate 12 acres of land. See State of Wyoming's Objections to Special Master's Report, Vol. 2 at 15:1 (Mar. 18, 1983).

The district court accepted most of the special master's recommendations (Pet. App. 121a-131a, 168a-279a). It concluded, however, that the United States had established the Wind River Reservation primarily to encourage the Indians to pursue an agrarian existence, and it therefore rejected the part of the master's proposed award based on non-agricultural needs (*id.* at 182a, 216a-222a, 262a-263a). Instead, the court held that the PIA standard provided the *sole* basis for quantifying the

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[5] Wyoming argued that application of the practicably irrigable acreage standard provided the Tribes with sufficient water to meet their minimal needs and "urge[d] the court to reject all amounts recommended by the Master in excess of that required to service what was proven to be PIA." See Wyoming's Brief in Support of Motion for Action Upon the Special Master's Report, Vol. 1, at 24, 26-27 (Mar. 18, 1983).

Reservation's reserved water rights (*id.* at 262a-263a). The district court made several adjustments to the special master's quantification and awarded the Tribes a total reserved water right of 479,427 acre-feet per year, measured by the Tribes' historic and future agricultural needs. See *id.* at 169a-182a.

The Wyoming Supreme Court largely affirmed the district court's decision. Pet. App. 1a-119a. That court, like the district court and the special master, rejected Wyoming's challenge to the existence of a reserved water right (*id.* at A19a-A43a). It specifically held that "[t]he district court was correct in quantifying the Tribes' reserved water right by the amount of water necessary to irrigate all of the reservation's practicably irrigable acreage" (*id.* at 47a). The Wyoming Supreme Court then examined the specific quantification in this case and made a number of minor adjustments that had the effect of confirming a federal reserved water right of 500,717 acre-feet per year, based on 108,221 acres of practicably irrigable land. This award represented 290,490 acre-feet based upon the historic use of 54,216 practicably irrigable acres, and an additional 210,227 acre-feet based on 54,005 acres of future project lands found to be practicably irrigable.[6]

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has long held that when the federal government withdraws its land from the public domain and reserves it for a federal purpose, including the establishment of Indian reservations, the government, by implication, reserves appurtenant water to the extent needed to accomplish the purpose of the reservation. See, *e.g.*, *United States* v. *New Mexico*, 438 U.S.

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[6] Justice Thomas, joined in part by District Judge Hanscum, dissented. The relevant portion of their dissent stated that the Tribes' reserved water right should be quantified based on the permanent homeland concept to include both agricultural and non-agricultural uses. See Pet. App. 83a-84a. They would not have included, however, the future project lands in the agricultural quantification because those lands, in their view, "may be irrigable academically, but not as a matter of practicality" (*id.* at 84a).

696, 698 (1978); *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976); *Winters* v. *United States*, 207 U.S. 564, 577 (1908). The Court has further held that when the United States has established an Indian reservation to enable the Indians to adopt an agrarian rather than nomadic economy, the federally reserved water right should be quantified based on the amount of water needed to cultivate the reservation's practically irrigable acreage. See *Arizona* v. *California*, 373 U.S. 600-601 (1963) (*Arizona I*). Those principles control this case.

There is no longer any dispute that when the United States set aside the Wind River Indian Reservation, it implicitly reserved a water right for its Indian occupants. Furthermore, Wyoming itself has consistently asserted—and the lower courts have concluded—that the United States' primary purpose in establishing the Wind River Reservation was to provide an agrarian livelihood for its occupants. Nevertheless, Wyoming contends that the United States did not intend to provide the Tribes with sufficient water to cultivate their practicably irrigable lands. Instead, Wyoming repeatedly urges, the Indians are entitled to only so much water as necessary to assure that their existence is "not entirely defeated" (Pet. 11, 28, 32, 47). Wyoming's position is incorrect—not merely because it is harsh and unworkable, but because it is fundamentally inconsistent with *Arizona I*, the law governing federal reserved water rights, and the need for certainty and stability in western water law.

a. In *Arizona I*, this Court held that, where a group of Indian reservations had been established to transform nomadic Indians into self-sustaining farmers, "the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage" (373 U.S. at 601). This case cannot be distinguished in any relevant respect from *Arizona I*. Here, as in that case, the Indians' agricultural lands were set aside with the understanding that the Indians would have to irrigate them to make them productive, that they would necessarily need to increase the cultivation of those lands over time to satisfy their future needs, and that the future Indian population could not be predicted with any degree of certainty. Here, as in

Arizona I, these three considerations indicate that the only "feasible and fair" measure of the Indians' water right is practicably irrigable acreage.

b. Implicitly recognizing that *Arizona I* and this case are indistinguishable, Wyoming argues that *Arizona I*'s quantification method should be modified (to make it generally inapplicable), "discarded," or "replaced" (Wyo. Br. 21, 28, 47). Wyoming contends that *Arizona I*'s method is inconsistent with historical quantification practices, that it fails to take into account various equitable considerations, and that it presents inherent problems of proof. Each of these assertions is incorrect. First, the practice of measuring Indian water rights based on irrigable land is as old as the *Winters* doctrine itself. Second, this Court has repeatedly held that reserved water rights are questions of implied intent rather than equity; moreover, Wyoming's equitable arguments here are unpersuasive. Third, the practicably irrigable acreage standard is desirable precisely because it rests solidly on objective evidentiary criteria rather than intractable "equitable" considerations. More fundamentally, while Wyoming and its amici urge that the *Arizona I* standard should be "discarded" and "replaced," they are unable to agree upon or even articulate a workable alternative.

c. Quite apart from the legal and logical force of the *Arizona I* standard, there is a central practical consideration that convincingly counsels in favor of its retention: the compelling need for certainty in western water law. First, there is the need for certainty with respect to the final resolution of this litigation, which has consumed 12 years and substantial resources for all concerned. If this Court were to "discard" *Arizona I*'s quantification standard, this litigation would have been for naught, and the process would begin anew. Second, there is a need for certainty with respect to Indian water rights adjudications generally. As a result of the lower courts' universal adherence to *Arizona I* for more than 25 years, the practicably irrigable acreage standard has generated substantial reliance. If that standard were "discarded," ongoing litigation

and settlement negotiations would be derailed, impeding the orderly and efficient resolution of numerous disputes. Finally, there is a need for certainty and continuity in reserved water rights theory and practice. The *Arizona I* standard is firmly grounded in nearly a century of water law; the various alternatives Wyoming and its amici propose would produce a clear break with past law and would replace certainty and stability with disorder.

ARGUMENT

THE WYOMING SUPREME COURT CORRECTLY RULED THAT WHEN THE UNITED STATES RESERVED WATER FOR THE WIND RIVER INDIAN RESERVATION'S FUTURE AGRICULTURAL NEEDS, IT RESERVED SUFFICIENT WATER TO CULTIVATE THE RESERVATION'S PRACTICABLY IRRIGABLE LANDS

The Wyoming Supreme Court has decisively resolved Wyoming's challenge to the Wind River Indian Reservation's reserved water rights in three unexceptional steps. First, the court recognized that the United States' creation of the Wind River Indian Reservation carried with it sufficient water to accomplish the purposes of the reservation (Pet. App. 26a, 32a-33a). See *United States* v. *New Mexico*, 438 U.S. 696, 699-700 (1978); *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976); *Arizona* v. *California*, 373 U.S. 546, 600 (1963) (*Arizona I*); *United States* v. *Powers*, 305 U.S. 527, 533, (1939); *Winters* v. *United States*, 207 U.S. 564, 575-577 (1908). Next, it held, as Wyoming itself had urged (see page, 6, *supra*), that the Reservation's primary purpose was to transform a nomadic people that wandered over a vast territory into a self-sufficient agrarian community that would cultivate irrigated lands (Pet. App. 33a-41a). See *Shoshone Tribe*, 304 U.S. at 118. The court then ruled that since the United States had created the reserved water right to meet the Tribes' future agricultural requirements, the Tribes' right should be measured by the amount of water necessary to cultivate the Reservation's "practicably irrigable acreage" (Pet. App. 47a). See *Arizona I*, 373 U.S. at 600-601.

This Court has declined to review the Wyoming Supreme Court's first two steps. Thus, we may take it as given that the United States reserved a water right to meet the Wind River Indian Reservation's future agricultural needs. The only remaining question is how to measure that right. We submit that this Court correctly resolved that issue in *Arizona I*. As a general matter, when the United States has established Indian reservations to transform nomadic people into farmers and has reserved associated water rights to provide for their future agricultural requirements, "the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage." 373 U.S. at 601. This case, which is indistinguishable in all relevant aspects from *Arizona I*, provides no occasion for creating an exception to the general rule. Wyoming's alternative approach—which would provide the Tribes with water only if, absent the water, their existence would be "entirely defeated" (Wyo. Br. 11, 28, 32, 47)—is unabashedly designed to extinguish the Tribes' reserved rights. It has no grounding in reserved water rights principles, would lead to gross inequities, and is ultimately unworkable. We begin by describing the practicably irrigable acreage (PIA) standard and why it is applicable here. We then turn to the legal and logical deficiencies of Wyoming's contention.

A. The Wyoming Supreme Court Correctly Followed This Court's Decision In *Arizona I*

This Court has recognized for more than 80 years that when the United States withdraws federal land from the public domain, it may implicitly include a reserved water right, vesting on the day of the withdrawal, to unappropriated waters. *Winters* v. *United States*, 207 U.S. at 576-577. See *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703 (1899).[7] In recognizing an implied right, the Court most assuredly does not, as Wyoming suggests, "repair oversights by Congress and the

[7] See also, *e.g.*, *New Mexico*, 438 U.S. at 698 (recognizing a reserved water right for a national forest); *Cappaert*, 426 U.S. at 143-146 (recognizing a reserved water right for a national monument).

President" (Wyo. Br. 17). Instead, it performs the familiar judicial task of interpreting treaties, statutes, and executive orders based on their express terms and reasonable implications.

In the case of Indian reservations created by treaty, the existence or non-existence of the reserved water right generally "turns on the agreement" between the parties. *Winters*, 207 U.S. at 575; see also *United States* v. *Walker River Irrigation Dist.*, 104 F.2d 334, 336 (9th Cir. 1939). And just as the agreement determines the existence of the right, it is likewise the basic source for determining how to quantify that right. Cf. *Arizona* v. *California*, 460 U.S. 605, 616 (1983) (*Arizona II*); *Arizona I*, 373 U.S. at 597. The PIA standard rests on the reasonable inference, applicable to most Indian treaties, that when the United States establishes an Indian reservation for future agricultural use, the amount of agricultural land set aside corresponds to the Indians' anticipated future needs. The PIA standard accordingly quantifies the associated water right to permit cultivation of that land.

1. *Arizona I* properly employed the "practicably irrigable acreage" quantification method to measure an Indian reserved water right set aside for future agricultural needs

This Court's decision in *Arizona I* addressed the quantification of these so-called "*Winters*" rights. Arizona brought an original action against California for a determination of the respective States' rights to the use of the waters of the Colorado River and its tributaries (373 U.S. at 550-551). The United States intervened and requested, among other matters, confirmation of federal reserved water rights for five Indian reservations adjoining the mainstream of the Colorado River in Arizona, California, and Nevada. In accordance with *Winters*, the United States urged that when it set aside the Indian reservations, it reserved water for the benefit of the present and future needs of the Indians. The United States further maintained that the amount of water reserved should be ascertained by reference to the practicably irrigable acreage of each reservation. See Brief in Support of Findings of Fact and Conclusions of Law

Proposed by the United States of America 21-35 (before the special master).

The special master carefully reviewed the *Winters* decision and its progeny, the reasonable inferences from the creation of the particular reservations, and the alternative bases for quantification. See *Arizona I*, 1960 Term, No. 8 Orig. Report of Simon H. Rifkind, Special Master 254-266 (Dec. 5, 1960) [hereinafter *Arizona I* Special Master's Report]. See Appendix, *infra* (reproducing the relevant pages). He agreed with the United States' position, stating:

> I have concluded that the United States effectuated the intention to provide for the future needs of the Indians by reserving sufficient water to irrigate all of the practicably irrigable lands in a Reservation, not by the number of Indians inhabiting it.

Id. at 262. The special master explained:

> At the times of the creation of the five Indian Reservations in question, it was impossible to predict the future needs of the Indians who might inhabit them. Indeed, in some instances it was not clear which Indian tribes would ultimately be settled on a particular Reservation. What the United States did, in withdrawing public lands for these Indian Reservations, was to establish areas that could be used in the indefinite future to satisfy the needs of Indian tribes in the United States as those needs might develop. It follows from this that the United States intended to reserve enough water to make the lands productive, in other words, enough to irrigate all of the practicably irrigable acreage. Only by reserving water in this manner could the United States ensure that the Reservation lands would be usable when needed to support an Indian economy.

Ibid.[8] He specifically considered and rejected the possibility of an "open-ended" decree or of a decree based on an abstract prediction of reasonably foreseeable needs. *Id.* at 263-265.

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[8] He further observed (*Arizona I* Special Master's Report 262):

> This conclusion is also supported by the fact that the irrigable land originally withdrawn for each of the five Indian Reservations was con-

This Court reviewed the special master's report and recommendations, and it confirmed his decision to quantify the Indians' reserved water rights through an assessment of the reservations' practicably irrigable lands. *Arizona I*, 373 U.S. at 600-601. The Court agreed that the United States had reserved water rights for the Indians (*id.* at 600), and it further stated:

> We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations. Arizona, on the other hand, contends that the quantity of water reserved should be measured by the Indian's "reasonably foreseeable needs," which, in fact, means by the number of Indians. How many Indians there will be and what their future needs will be can only be guessed. We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage.

Id. at 600-601. Thus, *Arizona I* adopted the PIA standard for ascertaining the amount of water reserved for the needs of the Indians on a reservation set aside for agricultural purposes, and the Court's subsequent decrees incorporated that standard. See *Arizona* v. *California*, 376 U.S. 340, 344-345 (1964); *Arizona* v. *California*, 439 U.S. 419, 421-423 (1979). As the Court later observed in refusing to reopen certain aspects of the *Arizona I* judgment, "the irrigable-acreage standard allowed a present water allocation that would be appropriate for future needs." *Arizona II*, 460 U.S. at 617.

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siderably more extensive than was necessary to support the Indians who inhabited the Reservations immediately after their establishment. The only explanation for this withdrawal of excess irrigable acreage is that the United States intended it to be utilized in the future. It must have been apparent that unless the United States reserved water for the land at the time of withdrawal, there might be no water left to appropriate at the time that the land was needed for the purposes for which it was withdrawn.

2. *Arizona I*'s quantification method is equally applicable in this case

The Wind River Indian Reservation's reserved water rights for agricultural needs are, by all relevant criteria, indistinguishable from those involved in *Arizona I*, and they should be quantified by the same standard. The Wyoming Supreme Court, the Wyoming district court, the special master, and *even* Wyoming itself (at least in the proceedings below) recognized that fact. Thus, the Wyoming courts quite properly quantified the Tribes' water right for agricultural needs based on *Arizona I*'s principles.

As we have explained, *Arizona I* held that the PIA standard, which measures an agricultural reservation's reserved water right on the basis of the pertinent objective criterion—irrigable acreage—rather than an ultimately subjective prediction of future water consumption, is "the only feasible and fair way" to reach a fixed measure of the Indians' entitlement. *Arizona I*, 373 U.S. at 601. The *Arizona I* special master accurately identified three reasons why this is so: (a) the reservations were established for agricultural purposes and irrigation was necessary "to make the lands productive"; (b) the lands were to be used "in the indefinite future to satisfy the needs of the Indian tribes • • • as those needs might develop"; and, (c) it was "impossible to predict" the number of Indians who might inhabit the reservations or their evolving individual needs. *Arizona I* Special Master's Report 262. The Wind River Reservation shares each of those elements.

First, the Wyoming courts found—and Wyoming does not dispute—that the Wind River Reservation was established for agricultural purposes and that irrigation was necessary to make the reservation lands productive. See, *e.g.*, Pet. App. 26a, 41a, 211a. The Shoshones selected and the United States reserved these lands in full expectation that the Indians would undertake irrigated agriculture. See *id.* at 32a-41a; *Shoshone Tribe*, 304 U.S. at 114, 117-118; *Shoshone Tribe*, 85 Ct. Cl. 341-343, 346. Since the United States reserved the water right to transform the Indians into productive farmers, the natural measure of that

right is the amount of water necessary to make the Indians' farming land productive.

Second, the Wind River Reservation's lands were expected to satisfy the Indians' future needs as those needs might develop. The Wyoming courts correctly recognized that the United States entered into the Second Treaty of Fort Bridger specifically to remove the Indians from a large expanse of territory, to restrict them to a diminished area, and to convert them from a nomadic to an agricultural livelihood. Pet. App. 9a, 34a-41a, 207a. The Treaty contemplated that the Indians would "create an *independent* permanent farming community upon the reservation" to meet their future needs. *Shoshone Tribe*, 304 U.S. at 118 (emphasis added). At the time the Shoshones relocated to the Wind River Reservation, they were "blanket Indians, unable to read, write, or speak English" (*id.* at 114). Like the *Arizona I* Indians, they "were not an agricultural people and it was necessary for them to develop their agricultural skills after settling on the Reservation" (*Arizona I* Special Master's Report 261). Thus, their *Winters* rights necessarily included sufficient water to meet their future uses as they "continued through years." *Winters*, 207 U.S. at 577.[9]

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[9] Indeed, here, as in *Arizona I* (see note 8, *supra*), the United States consciously set aside substantially more agricultural land than the initial occupants, even if trained in farming, would have required. As in *Arizona I*, "the possibility of expanding populations, expanding agricultural development, and hence expanding water needs must have been apparent at the time [the] Reservation was created." *Arizona I* Special Master's Report 260. See *Shoshone Tribe*, 85 Ct. Cl. at 345 (quoting the United States Indian Agent's 1866 recitation of a traveler's report that the region contained "farming land enough to support a population of two hundred thousand persons"). And here, as in *Arizona I*, the "only explanation for this withdrawal of excess irrigable acreage is that the United States intended it to be utilized in the future." *Arizona I* Special Master's Report 262.

Time has shown that this expectation was justified. The Wyoming Supreme Court recognized that of the 108,221 practicably irrigable acres, 54,216 acres had been historically used. See page 8, *supra*. Through most of this century the Wind River Reservation had more success than the Arizona reservations in putting its practicably irrigable acreage into production. For example, the *Arizona I* special master determined that there were 107,558 practicably

Third, when the United States created the Wind River Reservation, the Reservation's future population and its corresponding needs were no more predictable than the *Arizona I* reservations' populations and needs. Not only was it impossible to predict the future growth of the initial Shoshone population, but there was substantial uncertainty over what tribes ultimately would be settled on the Reservation. Article II of the Second Treaty of Fort Bridger gave the Shoshone-Bannock Indians the option of settling on the Wind River Reservation or choosing a separate home (see note 2, *supra*). 15 Stat. 674. In addition, Article II of the Treaty provided for the possible admission of "other friendly tribes" (*ibid.*), including perhaps other Shoshone Tribes that continued to occupy large tracts of western land described in treaties similar to the First Treaty of Fort Bridger. See *Northwestern Bands*, 324 U.S. at 345 n.7. Indeed, the Northern Arapahoes were eventually settled on the reservation, an event that could not have been specifically predicted. See *Shoshone Tribe*, 299 U.S. at 485-491.

Given the essential similarity between the situation in *Arizona I* and the situation here, there is no principled basis for denying the Wind River Indian Reservation application of the PIA standard established in that case.[10] Wyoming essentially con-

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irrigable acres within the Colorado River Indian Reservation (*Arizona I* Special Master's Report 272), only about 30,000 acres of which had been historically irrigated (Arizona's Answering Br. 106). Since the *Arizona I* water rights quantification, however, the Colorado River Reservation has increased its irrigated acreage to an annual average of more than 70,000 acres. See Bureau of Indian Affairs, U.S. Dep't of the Interior, *Special Irrigation Report and Recommendations* 29 (July 1988) (Prepared for the Deputy to the Assistant Secretary – Indian Affairs (Trust and Economic Development)).

[10] Indeed, it can plausibly be argued that the Wind River Reservation, which was created by treaty rather than executive order, has an even higher claim to the PIA standard because "treaties are construed more liberally than private agreements" (*Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 431 (1943)), and certainly no less liberally than non-contractual executive orders. In addition, "[b]y a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians." *Winters*, 207 U.S. at 576.

ceded as much below. It maintained throughout the trial that "if a reserved water right was created on behalf of the Wind River Indian Reservation, it was created solely to provide the Indians living thereon with a supply of water for domestic uses, *for the irrigation of all practicably irrigable land on said Reservation,* and for stockwatering purposes." State of Wyoming's Response to the United States' Statement of Claims 12 (July 16, 1980) (emphasis added). See pages 6-7, *supra*. Even if there are situations where the PIA standard should not be employed, certainly *this* is not one of them. The Wyoming Supreme Court properly concluded that the *Arizona I* standard for quantifying the Indian water rights should be applied in this case.

B. The "Practicably Irrigable Acreage" Standard of *Arizona I* Should Not Be Modified, "Discarded" Or "Replaced"

Implicitly recognizing that *Arizona I* controls this case, Wyoming and its various amici now argue that *Arizona I*'s quantification standard should be modified (by making it generally inapplicable) (Wyo. Br. 21-28), "discarded" (*id.* at 28-47), or "replaced" (*id.* at 47-49). This Court does not lightly "discard" its precedents, and Wyoming provides no basis for doing so here—especially in light of the disparity in the treatment of similarly situated tribes that necessarily would result (from changing a rule that is res judicata in *Arizona I* and in other cases that have followed it. Wyoming's argument rests on a basic misconception of federal reserved water rights and the PIA standard. Wyoming's alternative standard, which would permit state courts to "equitably tailor" (*id.* at 12, 47-48) the reserved right, providing water simply to assure that the purposes of the reservation are "not entirely defeated" (*id.* at 11, 28, 32, 47. 48), is no standard at all.

1. The federal reserved water right doctrine was *not* "created by this Court as a safety net or insurance policy to cure retroactively congressional and executive oversights"

Wyoming's argument proceeds—with its very first sentence (Wyo. Br. 17)—from a fundamental misunderstanding of federal reserved water rights. As we have explained (pages 12-13, *supra*), the United States creates reserved water rights, either expressly or implicitly, through treaties, statutes, or executive action. See, *e.g.*, *Arizona II*, 460 U.S. at 616; *Arizona I*, 373 U.S. at 597. This Court occasionally must perform the traditional judicial task of interpreting a treaty, statute, or order to determine whether such rights in fact were created. When faced with such disputes, it has resolved them as "a question of implied intent" (*New Mexico*, 438 U.S. at 698). See also, *e.g.*, *Cappaert*, 426 U.S. at 138-139; *Winters*, 207 U.S. at 576-577. The courts are not empowered, however, to "create[]" such rights "to repair oversights by Congress and the President" (Wyo. Br. 17). Nor can they erect "safety net[s]" (*ibid.*) or issue "insurance polic[ies]" (*ibid.*) to protect the federal government, an Indian tribe, *or* the States from past legislative and executive actions.

This fundamental point is significant because Wyoming's entire argument is premised on the notion, soundly disapproved in *Arizona I* (373 U.S. at 597) and *Arizona II* (460 U.S. at 616), that Indian reserved water rights are matters of judicial inclination. Founded on this premise, Wyoming's arguments vary from forum to forum and are not moored to the treaty purposes, to past precedents, or to the "compelling need for certainty in the holding and use of water rights" (*Arizona II*, 460 U.S. at 620). Wyoming now argues that the PIA standard it once supported was wrong and that this Court should set aside 12 years of litigation based on that standard and "equitably tailor" (Wyo. Br. 11-12) the water rights at issue to some undefined standard of present need (*id.* at 47, 48). *Arizona I* correctly rejected that approach and, instead, adopted a quantification standard that is based upon the reasonable inferences to be drawn from the executive and legislative action that created the reservation. See pages 13-15, *supra*.

Arizona I's quantification standard, which is intended to provide a "feasible and fair" (373 U.S. at 601) measure of Indian water rights, does not, of course, ignore the question of fairness. The Court obviously considered that factor, but it did so because, as a matter of treaty, statutory, or executive order construction, the United States can be presumed to act "fairly" in its dealings with the Indians. See 373 U.S. at 597, 599-600. Even if, as Wyoming seems to suggest (Wyo. Br. 13), the treaty involved here should be construed to provide the Tribes with no more than a " 'moderate living' " (quoting *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 686 (1979) (*Fishing Vessel*)), the Tribes have not received an excessive award. As we discuss (see pages 35-38, *infra*), the reserved right recognized in this case remains essential now, as it was in 1868, to satisfy the treaty's ultimate goal of meeting the Indians' basic needs.[11]

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[11] In *Fishing Vessel*, this Court interpreted a treaty that gave the Indians the right of taking fish in common with other citizens as providing both Indians and non-Indians "a right secured by treaty, to take a fair share of the available fish" (443 U.S. at 685). In accordance with that construction, the Court held that the Indians were entitled to no more than 50% of the available fish in any given year, subject to modification in light of the treaty's objective of providing the Tribes with a "moderate living" (*id.* at 686-687). *Fishing Vessel*'s specific method for quantifying the Tribes' fishing rights, which permitted a take of fish that would necessarily vary from year to year, cannot be applied to questions of reserved water rights, which must be based on "a *fixed* calculation of future water needs" (*Arizona II*, 460 U.S. at 617). But if Wyoming's point is that, when shared entitlement to scarce natural resources is at issue, the United States should not be presumed (absent contrary evidence) to have provided the Indians with more than a "moderate" living, then the Wyoming Supreme Court's award is consistent with that presumption – since only by means of irrigation can the reserved lands serve their purpose of providing agragian sustenance to the existing and future Indian inhabitants of the Reservation. See note 22, *infra*.

2. **Wyoming has failed to demonstrate any principled basis for limiting *Arizona I*'s "practicably irrigably acreage" standard "to only those agricultural Indian reservations for which there is no other means to quantify the federal reserved water right"**

Wyoming asserts that the PIA standard is inconsistent with the historical practice of quantifying a federal reserved water right based on need and that the PIA standard should be limited to only those reservations where there is no other means to quantify the reserved water right (Wyo. Br. 21-28). Wyoming fails to grasp, however, that irrigable acreage *is* a reasonable measure of the reservation's future agricultural need and that the use of irrigable acreage as a measure dates back to *Winters* itself. See F. Cohen, *Handbook of Federal Indian Law* 316-317 (1942). Moreover, Wyoming ignores *Arizona I*'s basic premise: the PIA standard generally is "the only feasible and fair way" to measure a reserved right based on future agricultural need. 373 U.S. at 601.

a. The *Winters* dispute not only gave legal recognition to the concept of Indian reserved water rights, but it also gave birth to the PIA standard. The *Winters* controversy arose from Indian irrigation activities on the Fort Belknap Indian Reservation in what is now the State of Montana. The United States had set aside that reservation in 1888 as a home for the Gros Ventre and Assiniboine Tribes. Some of the reservation lands were arid, but adaptable to farming if irrigated, and the Indians, with the assistance of the federal government, constructed irrigation facilities and began to irrigate a portion of the reservation lands with water diverted from the Milk River. Upstream non-Indian settlers, however, constructed their own irrigation works and diverted substantially all of the waters of the river. Consequently, the United States sought and obtained an injunction from the federal circuit court restraining the upstream diversions. See *Winters*, 143 F. 740, 741-742 (9th Cir. 1906).

The defendants appealed, specifically asserting that " 'said Circuit Court erred in holding that by the treaty made * * * between the United States and the Indians * * * there was reserved

to the said Indians the right to the use of the waters of the Milk river to an extent reasonably necessary to irrigate the lands included in the reserve created by the said treaty * * *.' " 143 F. at 743.[12] The court of appeals affirmed, stating "we are of the opinion that the court below did not err in holding that 'when the Indians made the treaty granting rights to the United States, they reserved the right to use the waters of the Milk river, *at least to an extent reasonably necessary to irrigate their lands*' " (*id.* at 749 (emphasis added)). See also 148 F.2d 684. This Court, in turn, affirmed the judgment, emphasizing that the reservation of water was necessary to meet the Tribes' future needs. 207 U.S. at 575-578.[13]

Thus, the *Winters* doctrine, since its origins, has been understood to measure the Indians' reserved water rights by reference to their irrigable lands. For example, the noted Indian law scholar, Felix Cohen, characterized *Winters* as holding that "where land in territorial status was reserved by treaty to an Indian tribe, there was impliedly reserved for the Indians, and withheld from subsequent appropriation by others, water of the streams of the reservations *necessary for the irrigation of their lands*." F. Cohen, *supra,* at 316 (emphasis added). See also *id.* at 317 ("no appropriation of water * * * which reduces the amount of water in a stream within an Indian reservation below the amount *necessary for irrigation of Indian lands* is valid") (emphasis added). This follows as a matter of treaty construction. The Indians, by agreeing to cede lands that they did "not re-

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[12] Thus, the *Winters* defendants' description of the trial court's action contradicts Wyoming's assertion that the court was willing to protect only "existing irrigation" (Wyo. Br. 22 n.29).

[13] The Court reasoned, from the terms and circumstances of the agreement creating the reservation, that the United States intended to transform the Tribes from a "nomadic" to a "pastoral and civilized" way of life (207 U.S. at 576) and that the United States implicitly reserved irrigation water to accomplish that objective (*ibid.*). "The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years" (*id.* at 577 (citations omitted)).

quire" for the satisfaction of "their present or prospective wants" (Act of May 1, 1888, ch. 213, 25 Stat. 113), presumably retained lands (and water) essential for their future needs.

Wyoming's assertion that "[e]arly quantifications * * * were based on an agricultural Indian reservation's reasonably foreseeable needs" (Wyo. Br. 21) is correct in a sense, but the assertion is incomplete. The courts looked to the Indians' needs, but they determined those needs based on the Indians' irrigable acreage, including lands that could be irrigated in the future. The cases Wyoming cites (which the special master reviewed in *Arizona I*, see Appendix, *infra*) bear this out.

In *Conrad Inv. Co.* v. *United States*, 161 F. 829 (9th Cir. 1908), the court of appeals held that the Indians of the Blackfeet Indian Reservation in Montana had the right to use the waters of Birch Creek, which bordered the reservation, "to the extent reasonably necessary for the purposes of irrigation and stock raising, and domestic and other useful purposes." *Id.* at 831. In measuring the reserved right, the court of appeals decreed a defined amount of water in the quantity set forth by the trial court. The trial court opinion in *Conrad* shows that the decreed quantity was, in fact, based on the total amount of irrigable, rather than irrigated, acreage. 156 F. 123, 129-132 (D. Mont. 1907).[14] The court of appeals, like the trial court, nevertheless provided that the Tribes could reopen the decree "whenever the needs and requirements of the [Indians] * * * for irrigating and other useful purposes upon the reservations exceed the amount of water decreed for that purpose * * *." 161 F. at 835.

Thus, *Conrad* indicated that irrigable acreage was the basis for quantifying the reserved water right for agricultural pur-

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[14] The trial court found that "from 8,000 to 10,000 acres of land upon the reserve is susceptible of irrigation from Birch Creek" (156 F. 130) and concluded from the opinions of several experts that the "amount of 1,666⅔ inches will be ample for the irrigation of 10,000 acres" (*ibid.*). It then entered an injunction affirming "the right of the government to have flowing at all times in the stream the amount of 1,666⅔ inches" (*id.* at 132), adding that "the government will have leave to apply for a modification of this decree at any time that it may determine that its needs will be in excess of the amount of water so designated" (*ibid.*).

poses and, to assure full accommodation of future change or growth in the Indians' needs, provided that the decree confirming those rights should be open-ended. That same court of appeals, speaking in general terms about the effect of two treaties it was construing (including the treaty by which the Wind River Indian Reservation had been created), subsequently stated:

> The purpose of the government was to induce the Indians to relinquish their nomadic habits and to till the soil, and the treaties should construed in the light of that purpose and such meaning should be given them as will enable the Indians to *cultivate eventually the whole of their lands* so reserved to their use."

Skeem v. *United States*, 273 F. 93, 95 (9th Cir. 1921) (emphasis added).

The court of appeals temporarily retreated from that standard in *United States* v. *Walker River Irrigation Dist.*, 104 F.2d 334 (9th Cir. 1939), based on the facts of that case. The United States claimed a reserved right sufficient to irrigate all of the 11,000 irrigable acres within the Walker River Reservation. The court of appeals alluded to the total irrigable acreage standard, but stated that it was "not necessarily the criterion for measuring the amount of water reserved" on the Walker River Reservation (*id.* at 340). It noted that 1900 acres had been put into cultivation by 1886 and that the number of cultivated acres had remained essentially unchanged since then. It held that in light of a declining Indian population and the special master's finding that " 'it has not been shown that there is the necessity or demand for the cultivation of a larger area than [that being irrigated],' " the Indians were limited to their existing use. *Ibid.*[15]

The court of appeals' subsequent decision in *United States* v. *Ahtanum Irrigation Dist.*, 236 F.2d 321 (9th Cir. 1956), cert.

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[15] Even if *Walker River* represented good law, it would not apply in this case since the Tribes' populations are expected to increase substantially in the future. See note 30, *supra*.

denied, 352 U.S. 988 (1957), indicated that *Walker River* was an aberration. The court of appeals stated (236 F.2d at 326):

> It is obvious that the quantum [of reserved water] is not measured by the use being made at the time the treaty reservation was made. The reservation was not merely for present but for future use. Any other construction of the rule in the Winters case would be wholly unreasonable * * *.

It further stated (*id.* at 327):

> It is plain from our decision in the Conrad Inv. Co. case, supra, that the paramount right of the Indians to the waters of Ahtanum Creek was not limited to the use of the Indians at any given date but this right extended to the ultimate needs of the Indians as those needs and requirements should grow to keep pace with the development of Indian agriculture upon the reservation.

These cases show that *Arizona I*'s use of the PIA standard to determine a reservation's future irrigation needs is both a logical and an historically recognized outgrowth—a corollary—of the *Winters* doctrine. Wyoming's challenge to the PIA standard is at bottom a challenge to *Winters* itself.

b. Wyoming's argument that practicably irrigable acreage should serve as the quantification measure of last resort suffers from a serious oversight. This Court determined in *Arizona I*, based on its evaluation of the special master's determinations, that the PIA standard is "the only feasible and fair way" to measure a reserved right based on future agricultural need. 373 U.S. at 601. Wyoming argues (Wyo. Br. 24-27) that this case is distinguishable from *Arizona I*, but, as we have shown, it is not distinguishable in any material respect. Wyoming's supposed distinctions, to the extent they are accurate, are irrelevant to the quantification question.

Wyoming first contends that this case is distinguishable from *Arizona I* because "the Wind River Reservation is *not* comprised of lands '. . . of the desert kind—hot, scorching sands. . . .' " (Wyo. Br. 24, emphasis in original). Certainly, this physical

distincton has no legal significance here. The Wind River Reservation's lands are indisputably "rather arid" (*United States* v. *Mazurie*, 419 U.S. 544, 546 (1975)), and require irrigation to make them productive. See Pet. App. 26a, 211a. In the absence of a water right, most of the Reservation's agricultural lands would be "useless" (*id.* at 211a). Moreover, the fact that there generally is more rainfall in Wyoming than in Arizona simply means that there is less competition for water among Indian and non-Indian users.

Wyoming also asserts that this case is distinguishable from *Arizona I* because the Shoshone Tribe "received the Wind River Reservation as a gift" (Wyo. Br. 25). That supposed distinction is incorrect. As we have explained (pages, 3-4, *supra*), the Shoshone Tribe exchanged their claim to the right of occupancy of 44 million acres for shared occupancy of the 3 million acre Wind River Reservation. See, *e.g.*, *Shoshone Tribe*, 304 U.S. at 113; *Shoshone Tribe*, 299 U.S. at 485. Indeed, the fact that the Shoshone Tribe negotiated for and obtained what is, from a hydrological point of view, " 'the best-watered portion of Wyoming' " (Wyo Br. 25) for their agricultural reservation, indicates that they, even more strongly than the Arizona Indians, expected to have the use of the water resources for their future needs.

Wyoming further contends that this case is distinguishable from *Arizona I* because the "Wind River Indian Reservation was set aside *specifically* for the Shoshone Indians" (Wyo. Br. 26 (emphasis in original)). This supposed distinction is also incorrect. As we have explained, the Shoshone Tribe obtained the Wind River Reservation subject to the potential occupancy of the Shoshone-Bannock Tribe and such "other friendly tribes" as might be relocated there, and the Northern Arapahoes subsequently were moved to the Reservation. See pages 4, 18 *supra*. Thus, this case presents essentially the same uncertainties with respect to future Indian population that were present in *Arizona I*.

c. Wyoming argues (Wyo. Br. 27-28) that *Arizona I* should be limited to "resolve the confusion over the reserved water right

quantification standard" (*id.* at 27). The only support Wyoming offers for its contention that such "confusion" exists is a Claims Court case (*White Mountain Apache Tribe* v. *United States*, 11 Cl. Ct. 614, 626 (1987)) that, as Wyoming acknowledges, applied the *Arizona I* standard. See Wyo. Br. 27.[16] In fact, as Wyoming later acknowledges (*id.* at 37 n.53), the lower courts have consistently looked to *Arizona I* as the guide for quantifying future agricultural needs.[17] Indeed, the case law is well-settled; it is Wyoming's position that is confusing.

Wyoming first exhorts this Court to "limit the applicability of its holding in *Arizona I* to those agricultural Indian reservations for which the [PIA] standard is the only measure of the amount of water needed for its primary agricultural purpose" (Wyo. Br. 27). It then changes course and counsels this Court to "unequivocally explain" that *Arizona I* should not be employed "*unless* it can be demonstrated that the standard provides for the quantification of only that water necessary to meet agricultural minimal needs and to insure that the primary agricultural purpose is not entirely defeated" (Wyo. Br. 28 (emphasis in original)). Thus, Wyoming seems torn between dis-

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[16] Wyoming suggests (Wyo. Br. 19 n.25, 27) that the United States employs a different standard for quantification in Indian water rights cases, depending on whether it is a plaintiff or a defendant. This is simply not true. In either instance, the United States seeks a quantification based on a sound scientific, engineering, and economic evaluation of practicably irrigable acreage.

[17] When called on to do so, state and federal courts, like Wyoming's courts here, have uniformly recognized or upheld PIA as the appropriate standard. See, e.g., *United States* v. *Adair*, 723 F.2d 1394, 1415-1416 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984); *United States* v. *Washington*, 694 F.2d 1374, 1383 (9th Cir. 1982); *Colville Confederated Tribes* v. *Walton*, 647 F.2d 42 (9th Cir.), cert. denied, 454 U.S. 1092 (1981); *United States* v. *Superior Court*, 144 Ariz. 265, 272, 697 P.2d 658, 665 (1985); *In Re the General Adjudication of All Rights to the Water in the Gila River System and Source*, Nos. W-1, W-2, W-3, W-4 (Maricopa County, Ariz. Super. Ct. Sept. 19, 1988) slip op. 17-18; *Montana* v. *Confederated Salish and Kootenai Tribes*, 219 Mont. 76, __, 712 P.2d 754, 764 (1985); *New Mexico ex rel. Reynolds* v. *Lewis*, Nos. 20294, 22600 (5th Dist. Ct., Chavez County, N.M.) (proposed op. 11, attached as Appendix A to New Mexico amicus brief).

membering and eviscerating *Arizona I*.[18] Whichever alternative Wyoming means, its suggestion is a prescription for disorder. These proposed glosses on *Arizona I* have no apparent purpose except to extinguish the Tribes' water rights. Indeed, Wyoming does not even hazard to suggest how these peculiar restrictions would be applied.

3. Wyoming has failed to articulate any principled reason why *Arizona I*'s "practicably irrigate acreage" standard should be "discarded" and "replaced"

Having argued that *Arizona I* should be limited, Wyoming next asserts that it should be discarded altogether and replaced (Wyo. Br. 28-47). Wyoming contends that *Arizona I*'s quantification method "results in unjustified windfalls for Indian reservations, it disregards this Court's 'sensitivity doctrine,' and its inflexibility carries with it inherent problems of proof" (*id.* at 28). Wyoming's first two assertions rest on a misunderstanding of this Court's reserved water rights decisions. The third assertion is plainly wrong. We begin by describing Wyoming's two favorite precedents, *Cappaert* and *New Mexico*, and explain how Wyoming has misconceived the relationship between those cases and *Arizona I*. We then discuss Wyoming's three specific assertions and the alternative standard that Wyoming proposes.

a. In *Cappaert*, this court held that when the United States set aside Devil's Hole National Monument, which provided an aquatic habitat for a unique species of pupfish, "it acquired by reservation water rights in unappropriated appurtenant water sufficient to maintain the level of the pool to preserve its scientific value" (426 U.S. at 147). In reaching that conclusion, the Court observed that the existence of a reserved water right turns on the government's intent, and that "[i]ntent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created" (*id.* at 139),

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[18] Wyoming took yet a different position below. It argued in the district court that the PIA standard was *the measure* of the Tribes' minimal needs. See Wyoming's Brief in Support of Motion for Action Upon the Special Master's Report at ii, 24-27 (Mar. 18, 1983).

citing *Arizona I* and *Winters*. It also stated that the reserved rights doctrine "reserves only the amount of water necessary to fulfill the purposes of the reservation, no more" (426 U.S. at 141), citing the specific pages of *Arizona I* that addressed the PIA standard (*ibid.*).[19]

In *New Mexico*, this Court held that when Congress enacted the Organic Administration Act of 1897, ch. 2, 30 Stat. 34, and other legislation that created the national forest system, it implicitly reserved water for two purposes: "to preserve the timber or to secure favorable water flows for private and public uses under state law" (438 U.S. at 718).[20] In reaching that conclusion, the Court observed that its past cases have "emphasized" that implied water rights reserve " 'only that amount of water necessary to fulfill the purpose of the reservation, no more' " (*id.* at 700), quoting *Cappaert* and also citing *Arizona I*'s approval of the PIA standard (*ibid.*).[21]

Cappaert and *New Mexico* are clear reaffirmations of the rationale of *Arizona I*, and thus of the Court's holding in that case that the PIA standard is the appropriate measure for quantifying a water right for an Indian reservation's future agricultural

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[19] The Court also observed that under the presidential proclamation establishing the monument, the underground pool containing the pupfish "need only be preserved, consistent with the intention expressed in the Proclamation, to the extent necessary to preserve its scientific interest" (426 U.S. at 141). The Court added that the district court in that case had "tailored its injunction, very appropriately, to minimal need, curtailing pumping only to the extent necessary to preserve an adequate water level at Devil's Hole, thus implementing the stated objectives of the Proclamation" (*ibid.*).

[20] The Court found this intent "revealed in the purposes for which the national forest system was created and Congress's principled deference to state water law in the Organic Administration Act of 1897 and other legislation" (438 U.S. at 718).

[21] In its next sentence, the Court noted that each time it "has applied the 'implied reservation of water doctrine,' it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated" (438 U.S. at 700). The Court then described *Winters*, *Arizona I*, and *Cappaert* in the associated footnote (*id.* at 700 n.4).

needs.[22] Wyoming nevertheless draws exactly the *opposite* conclusion and argues that *Cappaert* and *New Mexico* have called *Arizona I* into question. Wyoming splices a passing observation from *Cappaert* (see note 19, *supra*) to dicta from *New Mexico* (see note 21, *supra*) and declares a new standard for measuring Indian reserved water rights: the Indians must show "that the water [is] necessary to meet the minimal needs of the Reservation or to insure that its primary agricultural purpose was not entirely defeated" (Wyo. Br. 29). See also *id.* at 11, 33, 48. Wyoming asserts that the Wyoming Supreme Court erred in making a water rights award to the Tribes because it "was awarded in the absence of any evidence showing that [this standard]" was met (*id.* at 29).[23]

The short answer to Wyoming's assertion is that *Arizona I*'s standard, rather than Wyoming's, is the appropriate measure of need. This Court indicated in both *Cappaert* and *New Mexico* that the reserved rights doctrine "reserves only the amount of water necessary to fulfill the purposes of the reservation," but it also indicated that *Arizona I*'s PIA standard properly applies that test in determining an Indian Tribe's future agricultural needs. The Wyoming Supreme Court, the Wyoming district

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[22] This Court's subsequent decision in *Fishing Vessel* also endorsed *Arizona I*. The Court stated, "As in [*Arizona I*], the central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than is necessary to provide the Indians with a livelihood – that is to say, a moderate living" (*id.* at 686). See note 11, *supra*.

[23] Thus, Wyoming advances here essentially the same standard (except for the disjunctive form) that it proposed to limit *Arizona I*. See Wyo. Br. 28. See pages 28-29, *supra*. Wyoming seems to contend that under its standard, the Tribes should be limited to their "historic" water use (Wyo. Br. 30). Wyoming's only support for that result is, of course, the Ninth Circuit's 1939 decision in *Walker River*, which (as we explain page 25, *supra*) is the singular aberration in a line of cases stretching from *Winters* to *Arizona I*. In any event, Wyoming ultimately takes an even more restrictive position, contending that the Tribe is entitled only to water sufficient "to irrigate those historically irrigated Indians lands within the Wind River Indian Reservation *which are not and have never been awarded state water rights*" (Wyo. Br. 50, emphasis added). Not even *Walker River* supports that result.

court, and the special master all based their awards on a finding that the United States and the Tribes satisfied *that* standard. There was no other evidentiary burden to meet.[24]

b. Wyoming argues that the PIA standard should not be employed, as a matter of equity, based on the Tribes' turn-of-the-century acquisition of state water permits. See Wyo. Br. 28-35. Wyoming contends that from 1906 to 1915, the Tribes "enjoy[ed] a history of extensive irrigation development pursuant to state awarded water rights" (*id.* at 28) and that application of the PIA standard would therefore create an "undeserved benefit" and a "substantial windfall" (*id.* at 32). But, as we have explained (page 20, *supra*), Wyoming's assertion that a reserved water right should be measured through an equitable balancing based on post-reservation events is fundamentally inconsistent with the concept of a reserved water right. Indeed, this Court's decisions have uniformly rejected the suggestion that federal water rights are subject to an equitable restriction, balancing, or apportionment.[25] The question here, instead, is one of treaty interpretation. The Wyoming courts correctly ruled that the Second Treaty of Fort Bridger's withdrawal of the Wind River Indian Reservation included sufficient water to irrigate the Tribes' practicably irrigable lands, and Wyoming cannot credibly maintain that the award here would provide the

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[24] Indeed, since Wyoming itself agreed throughout the trial that the PIA standard was appropriate for measuring the Tribes' reserved water right (see notes 4, 5, *supra*), Wyoming is in no position to complain that the United States and the Tribes failed to satisfy the appropriate evidentiary burden.

[25] See *Arizona II*, 460 U.S. at 616 (observing that Indian water rights are "decided by recourse to congressional policy rather than judicial equity"); *New Mexico*, 438 U.S. at 698 (stating that the question of the quantity of water reserved is "a question of implied intent"); *Cappaert*, 426 U.S. at 138-139 (rejecting the argument that "the cases establishing the doctrine of federally reserved water rights articulate an equitable doctrine calling for a balancing of competing interests"); *Arizona I*, 373 U.S. at 597 (rejecting the argument that an Indian reservation's "rights to water should be determined by the doctrine of equitable apportionment"); *Winters*, 207 U.S. at 575 (stating, in a case that resulted in substantial hardships to non-Indians—see *Cappaert*, 426 U.S. at 138-139—that the Indians' reserved water rights "turn[ed] on the agreement" between the Tribe and the United States).

Tribes with more than a "moderate" standard of living. See page 21, *supra*.

This Court's past decisions effectively foreclose Wyoming's equitable argument. But since that argument is based on a less than complete exposition of the proceedings below, the history of the Wind River Reservation's water rights, and the present conditions on the Reservation, we feel constrained to point out some of its flaws. The principal thrust of Wyoming's argument below was that the provisions of the Act of March 3, 1905 (ch. 1452, 33 Stat. 1016), which provided that the Tribes could use a residue of certain funds from the sale of their lands to obtain state water rights, indicated that the Second Treaty of Fort Bridger had created no federally reserved water rights. The Wyoming Supreme Court (as well as the district court and the special master) rejected that contention. See Pet. App. 28a-31a. Wyoming has changed the focus of its argument and now asserts that the existence of state water permits places an equitable limitation on the measure of the reserved water right.[26]

Wyoming incorrectly contends that the application of the PIA standard in the face of these state permits has upset settled expectations or produced a windfall. As the Wyoming Supreme Court explained (Pet. App. 28a-31a), the United States secured these permits, before and for a short while after this Court's 1908 *Winters* decision, in an effort to protect the Tribes' rights from non-Indian appropriation in an era of legal uncertainty.[27] Thus,

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[26] Wyoming inaccurately states that the Tribes were awarded "state water rights" (Wyo. Br. 28). The Tribes actually received state water permits. A permit to appropriate water is not a "water right" under Wyoming law in the sense of a vested property right. Rather, a permit gives its holder only permission to appropriate water. A perfected water right does not arise until the permittee puts the water to beneficial use.

[27] Indeed, the Commissioner of Indian Affairs' 1906 Report observed that the Tribes' reserved water rights had recently come under challenge. See Report of the Commissioner of Indian Affairs, *Annual Report of the Department of the Interior* 83 (1906) ("Prior to the [Reclamation Act of 1902] there seems to be no instance of anyone denying the right and power of the General Government to appropriate sufficient water on an Indian reservation

the United States' acquisition of these permits was a legitimate effort to protect the Indians' interests in the event that the question posed in *Winters* was decided adversely to them. There is no merit—equitable or otherwise—to Wyoming's assertion that the United States' efforts to provide this "backstop" for the Tribes' reserved water rights should result in the termination of those rights. Cf. *Conrad Inv. Co.*, 156 F. at 131-132 (the government's approval of non-Indian irrigation works "do es not estop the government in any way as it respects the diversion and use of water from the public streams.").

Wyoming's contention (Wyo. Br. 35) that the recognition of these rights has upset settled expectations is meritless. As a general matter, "[t]he settlers who took up lands in the valleys of the stream were not justified in closing their eyes to the obvious necessities of the Indians already occupying the reservation" (*Walker River,* 104 F.2d at 339). See also, *e.g., Conrad Inv. Co.*, 156 F. at 132. The state permits (which generally were the earliest permits in the basin) put settlers on *additional* specific notice of the Tribes' intention to irrigate 145,000 acres. Moreover, the United States' acquisition of state water permits was accompanied by continued assertions of federal reserved water rights. See Pet. App. 30a-31a. The United States vigorously and successfully defended the Tribes' reserved water rights in *United States* v. *Parkins,* 18 F.2d 642 (D. Wyo. 1926), and *United States* v. *Hampelman,* No. 753 (D. Wyo. 1916) (reproduced at Shoshone Tribe Br. App. in Opp. 1a-2a). See also *Merrill* v. *Bishop*, 287 P.2d 620, 623 (Wyo. 1955). Thus, there was no basis for anyone to believe that the Tribes' water rights depended on state permits; instead, the permits provided an indication of the potential magnitude of the Indians' rights.

Wyoming's assertion (Wyo. Br. 31-35) that the PIA standard has provided the Tribes with a windfall is likewise incorrect. As

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for the needs of the Indians. Recently, however, these have been denied."). The acquisition of state water permits was a response to that challenge. The timing of the applications further verifies this conclusion. The federal officials secured state permits in 1905 to irrigate 125,000 of the 145,000 acres that eventually received permits (see Wyo. Sup. Ct. J.A., Vol. VII, at 520-523). The federal officials' timing coincides with the Commissioner's report and the *Winters* dispute.

a preliminary matter, the United States originally obtained state water permits for irrigating 145,000 acres, a substantially greater acreage than the 108,000 acres found practicably irrigable in this case. Wyoming realizes (*id.* at 28-29), however, that many of the Tribes' state water permits have lapsed. Following *Arizona I*, the United States allowed those permits to expire in light of this Court's reaffirmation of *Winters* and its acceptance of the PIA standard.[28] Wyoming now seeks to capitalize on the United States' and the Tribes' reliance on *Arizona I* by arguing that the Tribes' reserved water rights, as well, should be treated as irretrievably lost. Plainly, it is Wyoming, rather than the Tribes, that seeks an "undeserved benefit" here.

Looking to the realities of the situation, the Wyoming Supreme Court's award of 500,717 acre-feet of water based on 108,221 acres of practicably irrigable land cannot reasonably be called a "windfall." Approximately 58% of that award (290,490 acre-feet of water based on 54,216 irrigable acres) was based on historically irrigated lands. The very fact that those lands have been brought under irrigation is compelling evidence of the Indians' need for the water required to irrigate them.[29] Wyoming itself calculated, based on a 1980 Reservation population

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[28] Wyoming noted in its petition for a writ of certiorari (Pet. 6) that the government's decision to allow the permits to lapse was a response to *Arizona I*. It now mistakenly states that "it can only be presumed the water they produced was not needed" (Wyo. Br. 32). Indeed, the United States' action actually benefitted state water users by eliminating an unnecessary "paper cloud" that would result from having simultaneous federally reserved rights and state water permits for the same acreage. See generally Battle, *Paper Clouds Over the Waters: Shelf Filings and Hyperextended Permits in Wyoming*, 22 Land & Water L. Rev. 673 (1987).

[29] Wyoming virtually conceded as much when it suggested that the United States and the Tribes had failed to produce "evidence indicating that the purposes of the Wind River Indian Reservation have not and would not be satisfied by the historic levels of water usage or that the continuation of historic usage would entirely defeat Congress' primary purpose when it created the reservation." See Wyoming's Proposed Findings of Fact, Conclusions of Law, Judgment, and Interlocutory Decree, Pt. II, Proposed Finding of Fact 7-1, at 526.

estimate of about 4,500 tribal residents, that the historic acreage figure breaks down to only about 12 irrigated acres per Indian.[30] This is far less than the Second Treaty of Fort Bridger's authorization of agricultural allotments of up to 320 acres for heads of families and up to 80 acres for individual Indians who were not family heads (art. VI, 15 Stat. 675) or the general reclamation law's former allowance of 160 irrigable acres per individual.[31] As Wyoming mentions (Wyo. Br. 10, n.7), the total value of the Indians' crop production of the Wind River Reservation in 1987 was approximately $2.2 million. Using 1980 population figures, this figure amounts to a gross production value of less than $500 per Indian.[32]

As for future lands, the Wyoming Supreme Court's award for them (210,227 acre-feet based on 54,005 acres) was in no sense excessive. Wyoming asserts (Br. 28-29) that the fact that these

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[30] See page, 7, *supra*. A population forecast, which the special master found to be a reasonable one (Pet. App. 607a-608a), estimated that the Indian population of the Wind River Reservation would be 6,600 by the year 2000 and 9,740 by the year 2020. See Wyo. S. Ct. J.A., Vol. 10, Exh. 3. Using these figures, the historical land base breaks down to 8.3 acres of irrigated lands per Indian by 2000 and 5.6 acres per Indian by 2020.

[31] See Reclamation Act of 1902, § 4, 32 Stat. 389, 43 U.S.C. 392, 431, 439. In 1982, Congress revised this acreage limitation so that an individual can now obtain subsidized water from a federal reclamation project for up to 960 acres, and even more where an equivalency adjustment is in effect. Sections 204, 207 of the Reclamation Reform Act of 1982, Pub. L. No. 97-293, 96 Stat. 1263, 43 U.S.C. 390dd, 390gg. This revision was made in light of Congress's recognition that "the [acreage] limitations of existing law are too restrictive, given today's economy, to support a viable farming operation." H.R. Rep. No. 458, 97th Cong., 2d Sess. 9 (1982).

[32] Although Wyoming complains, with respect to the historic lands, that "the Wyoming courts fashioned a presumption that if the lands were the subject of a state-awarded water right they were practicably irrigable" (Wyo. Br. 41), the Wyoming Supreme Court noted in rejecting this contention (Pet. App. 60a-62a) that Wyoming initially advocated that very presumption. Moreover, as the Wyoming Supreme Court also observed, "Wyoming did attempt to prove that the claimed adjudicated acreage was not practicably irrigable, and in fact met its burden, convincing the master to delete some 5,017 acres of adjudicated lands" (*id.* at 61a).

lands had not been placed under irrigation demonstrates that they are not "needed." That assertion is based, however, upon the unsupported premise that the Tribes have already placed under irrigation all of the lands that they "need." The fact that the Tribes have already developed a portion of their lands with federal assistance does not show that they have no need similarly to develop the remaining portions of their practicably irrigable lands. To the contrary, the "future" lands may have remained unirrigated for a host of other reasons, such as the absence of a judicial decree quantifying the reserved water right, lack of capital and farming expertise, or the need for additional federal assistance. See note 34, *infra*.[33]

Given the special master's finding that "[t]he history of the Reservation consistently shows a level of unemployment far in excess of the rest of Wyoming" (Pet. App. 569a) (approximately 45% throughout the decade preceding issuance of the special master's report (*id.* at 568a-569a)), it would appear that the Tribes have a compelling need to develop the full agricultural potential of the Reservation. Indeed, even when all of the future projects lands are considered, the Wyoming Supreme Court's award provides a per capita water supply, based on 1980 population figures, for only about 24 acres per Indian.

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[33] Wyoming relies primarily on the Tribes' desire to export water as an example of the Tribes' lack of need. See Wyo. Br. 32-33. This argument is premised on an assumption, fundamentally inconsistent with *Arizona I* and *Winters*, that if the Tribes cannot put water to immediate use, they have no need for it. The United States reserved water for the Indians specifically because "if they were thrown into competition with the more advanced non-Indians in a race to acquire rights to water by putting it to beneficial use, they would have lost the match before it was begun" (*Arizona I* Special Master's Report 261). Even the arid States themselves sometimes find that water set aside for irrigation purposes cannot be put to immediate use and, as an interim solution, they authorize exportation until the irrigation uses develop. See *ETSI Pipeline Project* v. *Missouri*, 108 S. Ct. 805 (1988). Notably, Wyoming joined an amicus brief in that case that defended the water exportation plan at issue. See Brief for the States of Montana, North Dakota, South Dakota and Wyoming as Amicus Curiae in Support of Petitioners. The Wyoming Supreme Court refused to permit the Tribes to export water in this case, and the Tribes have raised that issue in their cross-petition (No. 88-492).

The Wyoming Supreme Court's award also falls far short of providing a "windfall" when the Tribes' water rights are compared to the water rights of non-Indians who reside within the exterior boundaries of the Wind River Reservation. According to Wyoming (Wyo. Br. 4), those non-Indians are currently irrigating some 120,000 acres within the Reservation. Hence, even when the future projects lands are taken into account, the United States and the Tribes are requesting confirmation of a water right quantified on the basis of less land than is now being irrigated by non-Indians within the Reservation.[34]

Finally, these figures must also be viewed in light of their historic context. The Tribes relinquished their claims to vast aboriginal lands in exchange for the Wind River Reservation. The 1868 Treaty that effected this exchange recognizes that the Tribes faced substantial cultural obstacles in developing an agricultural economy and that the Tribes' conversion from a nomadic to an agrarian existence would take time. Petitioner's contention that the Tribes should now be restricted to the "historic" water usage—and prevented from realizing further development of their practicably irrigable lands—is not an equitable result. And if fairness, as a matter of treaty construction, is the question, then the Wyoming Supreme Court's award certainly secures the Tribes "no more than" a "moderate living" (*Fishing Vessel*, 443 U.S. at 686).

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[34] Wyoming asserts that the Tribes have been assisted by "the infusion of massive amounts of congressionally mandated expenditures for the construction of irrigation projects" (Wyo. Br. 29) in the amount of some $2.3 million (*id.* at 5) expended primarily between 1905 and 1915 (*id.* at 28). This figure, however, should be considered in its proper context. The United States has expended almost $72 million to date on the Riverton Irrigation Project, an almost exclusively non-Indian reclamation project located on the Wind River Reservation. Bureau of Reclamation, U.S. Dep't of the Interior, *1984 Summary Statistics, Project Data*, Vol. III, at 309. In contrast, some $4.4 million of federal funds have to date been expended on the Indian project, including the "massive" $2.3 million spent more than 70 years ago. See Bureau of Indian Affairs, U.S. Dep't of the Interior, *Special Irrigation Report and Recommendations* 27 (July 1988) (Prepared for the Deputy to the Assistant Secretary—Indian Affairs (Trust and Economic Development)).

c. Like its first argument, Wyoming's second reason for discarding *Arizona I*'s PIA standard—that it "disregards the 'sensitivity doctrine' " (Wyo. Br. 35)—is premised on a mistaken belief that this Court decides reserved water rights questions based on equitable rules. Wyoming contends that this Court adopted a special rule in *New Mexico* favoring the States in reserved water rights cases to prevent "potential injustice" (Wyo. Br. 18) and as "one means of lessening the taut and harmful grip that reserved water rights can have upon Western water users" (*id.* at 36).[35] Wyoming has coined a new phrase, the "sensitivity doctrine," to describe that supposed result (*ibid.*). But *New Mexico* does not support Wyoming's assertion that the states have this favored status.

As we have explained, *New Mexico* unambiguously states that this Court determines the existence and measure of a reserved water right as "a question of implied intent" (438 U.S. at 698). See pages 20, 32-33, *supra*. *New Mexico* further indicates that the question whether a statute creates a reserved water right may be answered, in part, by reference to other statutes that exhibit a general policy of deference to state water law. 438 U.S. at 701-702. Thus, *New Mexico* identifies a guide to construing statutes; it does not create an equitable rule. Moreover, that guide—to the extent that it is useful here—does not aid Wyoming.

In *New Mexico*, the statute that created the reserved water right at issue—the Organic Administration Act of 1897—followed on the heels of a series of enactments exhibiting deference to state water law. See 438 U.S. at 702 n.5. See also *California* v. *United States*, 438 U.S. 645 (1978). In the course of construing the Act, the Court observed:

> Where water is necessary to fulfill the very purpose for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference

[35] Thus, Wyoming asserts that "[w]hen quantification of a reserved water right will reduce supplies available for water-needy state and private appropriators, this result must be a variable in the quantification equation" (Wyo. Br. 36).

> to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.

438 U.S. at 702. In this case, the Wyoming courts concluded that the Second Treaty of Fort Bridger's primary purpose was to transform the Indians from a nomadic to an agrarian culture. Thus, under *New Mexico*'s "primary purpose" rationale, it follows that the United States "reserve[d] the necessary water" to irrigate the Indians' lands, irrespective of other laws.

Moreover, the Second Treaty of Fort Bridger was negotiated in 1868, prior to all of the major enactments, except the Mining Act of 1866, that exhibited deference to state water law.[36] Thus, even if this case involved a "secondary" purpose, there would be no reasonable basis for construing the 1868 Treaty, which regulated relations between the United States and an Indian Tribe in an unsettled territory, based on the then unborn policy of deference to state water law.

Finally, Wyoming has little cause to complain about any lack of sensitivity to its interests. Wyoming litigated this case in its own courts; thus, there is no reason to believe that the forum was hostile to its concerns. Furthermore, the record demonstrates that the Wyoming courts were sufficiently atten-

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[36] The Mining Act of 1866 had, in relevant part, the limited purpose of assuring that "whenever, by priority of possession, rights to the use of water * * * have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same" (ch. 262, § 9, 14 Stat. 253). That statute, unlike the Second Treaty of Fort Bridger, "was not itself a grant of water rights pursuant to federal law" (*California*, 438 U.S. at 656). Instead, the Act was "a voluntary recognition of a preëxisting right of possession, constituting a valid claim to its continued use" (*ibid.*, citations omitted). Since the Wind River region was largely unsettled, the Act had no effect on the region's water resources.

tive to the needs of non-Indian water users.[37] Indeed, the Wyoming Supreme Court even considered Wyoming's conceptually infirm "sensitivity doctrine" (Pet. App. 32a, 69a-72a) and concluded that the proceedings "evidence[d] a sufficient sensitivity to the water needs of other water users" (*id.* at 72a).

d. As its final argument for "discarding" *Arizona I*'s quantification method, Wyoming contends that "[t]he 'practicably irrigable acreage' quantification standard's inflexibility results in inherent problems of proof" (Wyo. Br. 39). Actually, quite the opposite is true. The PIA standard is based on a well-defined concept that predictably relies on objective evidentiary tests.

Practicably irrigable acreage is not a complicated idea. The parties agreed that practicably irrigable acreage consists of "those acres susceptible to sustained irrigation at reasonable costs" (Pet. App. 229a, 534a). That definition requires a three-step analysis: first, a scientific study to identify arable lands (*id.* at 534a-544a); second, an engineering study to determine the feasibility of a proposed project from an engineering standpoint (*id.* at 544a-559a); and third, an economic study to determine whether future lands can be cultivated at reasonable costs (*id.* at 559a-580a).

This three-step process does not involve exotic or arcane principles: it is the same process that engineering firms routinely employ in planning irrigation projects. The process is not court-created; it has developed as a project planning device over an 80 year period, and the methodology is well-established.[38] It

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[37] For example, the claims of the United States and the Tribes for reserved rights for non-agricultural purposes, including groundwater claims, were entirely rejected (Pet. App. 44a). The water rights for the future projects lands were quantified based on an "average water duty * * * more restrictive than the present historic use in Water Division 3" (*id.* at 52a). The Wyoming courts also imposed a more stringent efficiency factor with regard to the historic lands than is currently being met by many non-Indian water users in the area (*id.* at 69a). In addition, the courts and the special master carefully scrutinized the evidence and rejected claims for some 50,000 acres for which the Tribes and the United States claimed water under the PIA standard (*id.* at 72a).

[38] As Wyoming seems to acknowledge (Wyo. Br. 42), this process is conceptually similar to that employed by the Bureau of Reclamation. The concept of

employs familiar disciplines—science, engineering, and economics—that a modern judge routinely encounters in his day-to-day trial activities. And, most importantly, it employs objective evidentiary criteria. The court makes a quantification determination through an essentially factual inquiry.

Indeed, Wyoming's contention that the PIA standard's "inflexibility results in inherent problems of proof" (Wyo. Br. 39) is self-contradictory. Wyoming asserts that the PIA standard is "inflexible" precisely because the standard excludes inquiries that Wyoming believes should be part of the quantification process but that are inherently *incapable* of proof. As we explain further below, Wyoming urges that the quantification inquiry should be completely open-ended, permitting the trial court to "fairly and equitably tailor the reserved rights doctrine to the needs of individual reservations" (*id.* at 12; see *id.* at 47-49). Thus, Wyoming would have the courts engage in a standardless equitable and sociological inquiry. Wyoming decries the "excruciating evidentiary exercise involved in determining practicably irrigable acreage" (*id.* at 47), but—paradoxically—it argues for a more complicated, and less predictable, evidentiary proceeding.[39]

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practicable irrigability developed in response to the Reclamation Act of 1902, ch. 1093, § 4, 32 Stat. 389, which provided in relevant part (emphasis added):

> [u]pon the determination by the Secretary of the Interior tha. any irrigation project is *practicable*, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be *practicable* to construct and complete as parts of the whole project * * * and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question.

See 43 U.S.C. 419. Thus, the western States and their water users—the primary beneficiaries of the reclamation laws—are familiar with the principles.

[39] Wyoming argues that quantification based on future irrigation is "nothing more than speculation" (Wyo. Br. 42) and that it is "doubtful that the 'future' projects would ever be built" (*id.* at 46). However, since a reserved water right is designed to meet future needs, any quantification measure must entail some predictions. And since the PIA standard rests on concepts of

Wyoming makes no real showing that the PIA standard is unworkable; instead, it raises a series of challenges to the district court's and the special master's factual findings. The Wyoming Supreme Court correctly rejected those challenges, which turned largely on conflicting expert testimony, and there is no need to dwell on them here. Indeed, as the opinions below indicate, the issues here are readily capable of judicial resolution. At bottom, Wyoming seeks to retry factual issues that have

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scientific, engineering and economic feasibility, it assures that the forecasting is reasonable. That fact is demonstrated in *Arizona I*, where the Colorado River Indian Reservation, which received a water right based on 108,000 practicably irrigable acres (and had historically irrigated about 30,000 acres), is now irrigating about 70,000 acres—a dramatic increase from 1963 levels. See note 9, *supra*.

General stream adjudications tend to be complicated, whether or *not* they involve Indian claims subject to the PIA standard, because they typically involve every claimed water right in a large geographic area. Thus, Wyoming is mistaken to ascribe the length and complexity of these suits to the use of the PIA standard. In any event, as this case illustrates, the trial courts are able to consider the evidence and reject claims for which they find insufficient support in the record. Indeed, although amicus New Mexico asserts (Br. 4) that the PIA standard is subject to abuse in application through "manipulations of data [which] make it possible to claim that huge amounts of lands are, under some speculative factual analysis, 'practicably' irrigable" (*ibid.*), its only support for that claim is a case where the trial judge applied the PIA standard and *rejected* the Tribes' claims, stating that "the United States and Tribe have failed to sustain their burden of proof" (*id.* at A13).

Wyoming's standard, by contrast, would be considerably more complex than the PIA standard. Wyoming would require a "foreseeable needs" inquiry (Wyo. Br. at 21-24), even though this Court rejected that inquiry in *Arizona I*, stating that "[h]ow many Indians there will be and what their future needs will be can only be guessed" (373 U.S. at 600-601). Wyoming would also require a standardless inquiry into the Tribes' "minimal needs" (Wyo. Br. 29, 37) and various "sensitivity" factors, including the "circumstances surrounding the reservation" (*id.* at 37), "whether quantification will damage water-needy state and private appropriators" (*ibid.*) and "the degree of injury to be suffered state users [*sic*]" (*id.* at 39), and "whether the reservation has had an opportunity to fully develop its agricultural industry" (*id.* at 48). All of these inquiries (and others) apparently might *supplement* the PIA analysis (*id.* at 48 & n.76.).

been resolved against it in *three* state forums. We answer those assertions in the margin.[40]

e. In its closing pages, Wyoming outlines its alternative to the PIA standard (Wyo. Br. 47-49). It concludes that the existing standard "should be replaced by a tailored approach" (*id.* at 47) that would leave state courts "at liberty to award reserved water rights in amounts" (*ibid.*)

> that are calculated to insure that a reservation's primary purpose(s) is not "entirely defeated;" that, insofar as possible with the constraints of the primary purpose, provide the reservation's Indians with water necessary to a "moderate" living standard; and, that will be "sensitive" to potential dislocation of state water rights.

In short, the Tribes are entitled to what the court thinks is fair, provided that the amount is not more than necessary to assure that their very existence is "not entirely defeated" (*ibid.*).

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[40] Wyoming asserts (Wyo. Br. 43) that the United States' witnesses "classified as arable some 26,275 acres which previously had been classified as *non*-arable by the Bureau of Reclamation." Wyoming neglects to mention, however, that the Bureau's 1961 investigation to which it refers examined arability based only on gravity irrigation whereas the much more recent HKM study—the study by the engineering firm that identified the arable lands for the United States—determined arability for both gravity and sprinkler irrigation systems.

Wyoming also attempts to discredit the Wyoming courts' factual findings by referring (Wyo. Br. 43, n. 66) to the testimony of one of its witnesses at trial, a former employee of the United States Soil Conservation Service, who "testified that the physical inquiry upon which the [future] projects were based was 'wholly inadequate.' " This testimony was not credited by the special master, probably in part because the Soil Conservation Service does not conduct arability studies (Tr. 10657) and the witness, Mr. Fowkes, said he had never done a land classification study (Tr. 10679-10681). Wyoming's assertions that the HKM study lacks the requisite degree of thoroughness rings particularly hollow in light of the cursory analysis performed by Wyoming's witnesses. As the special master found (Pet. App. 674a-675a):

> Experts for the State of Wyoming reviewed the HKM data, but spent limited time in the field on the Reservation. The thrust of their testimony was to question the amount of arable land HKM identified. Mr. Fowkes' testimony was general in nature, and he presented no acreage totals he felt should be deleted from those identified as arable by HKM.

Wyoming gives no specific guidance on how to apply this standard, but it does propose an ultimate result for this case. What emerges from Wyoming's "black box" is a suggested decree "awarding a Federal reserved water right in only the amount of water necessary to irrigate those historically irrigated Indian lands within the Wind River Indian Reservation which are not and have never been awarded state water rights" (Wyo. Br. 50). Thus, Wyoming's "equitable tailor[ing]" (*id.* at 12) would exclude the whole of the 145,000 acres that the Tribes intended to irrigate at the turn of the century (see pages 33-35, *supra*) and would include only whatever *other* lands that the tribes have *since* irrigated without a state permit. This is not a reserved right. It is, at best, a consolation prize. Moreover, this is the first time in this litigation that Wyoming has suggested an award on that basis.[41]

Wyoming ultimately tells us very little about its proposed quantification standard, but what it does tell us strongly counsels against its adoption. As Wyoming's own application of the standard shows, its produces harsh, unpredictable results that have no relationship to the central principle of "implied intent" (*New Mexico*, 438 U.S. at 698) that governs reserved water right determinations. Wyoming's various amici also argue that the PIA standard should be discarded and replaced, but on the question of an adequate alternative, they are in complete disarray.

For example, the State of California and the Metropolitan Water District of Southern California apparently advocate the use of open-ended decrees (Br. 11, 13-14), notwithstanding this

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[41] As we have explained, prior to trial before the special master Wyoming had contended that if there was a reserved right, that right should be quantified by use of the PIA standard in the amount of 323,716 acre-feet, which included a portion for future lands. See page 6, *supra*. Following trial, Wyoming argued that if a reserved right existed PIA was the appropriate standard, but implied that the reserved right extended only to historically irrigated acreage, including acreage for which a state appropriation permit had been secured. See *id.* at 7. Now, Wyoming urges this Court to direct the entry of a decree recognizing a reserved right only for those Indian lands which have been historically irrigated but have *never* had a state permit.

Court's express disapproval of that practice.[42] New Mexico argues that this Court should adopt a standard that will address "the broader purpose of a reservation created for a people" and that, based on present day needs, will "make the reservation a viable place for people to live, a home" (Br. 8.).[43] A group of New Mexico's communities takes direct issue with New Mexico's proposal to quantify federal reserved rights based on present day purposes (County of Chaves Br. 2 n.2) and suggests that this Court should devise some unidentified standard of quantification "tailored to a demonstration of the needs associated with the contemporaneous purposes for which Indian reservations were created" (*id.* at 12).[44] The Village of Ruidoso, also in New Mexico, takes yet a different course, urging the Court to adopt a quantification standard based on "minimal needs" (Br. 13).

The States of Arizona, Idaho, Montana, Nevada, Utah, and Washington suggest that this Court should adopt a "necessity" standard which "requires the balancing of many factors, one of which may be the use of PIA methodology" (Br. 20). The suggested standard is really one of no standards at all. The Salt River Project Agricultural Improvement and Power District, which is located in Arizona, goes a step further and calls for a

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[42] In *Arizona I*, those parties admittedly (Calif. Br. 11) bypassed their opportunity to explain their views on the quantification issue to this Court (*id.* at 11). This Court expressly rejected the open-ended decree alternative in *Arizona I* and reiterated its disapproval in *Arizona II*, 460 U.S. at 617, 622-623 n.15, because the alternative would not fulfill the essential requirement of "a *fixed* calculation of future water needs" (*id.* at 617, emphasis in original).

[43] The standard would recognize "current uses" and decree "water for future uses based on a projected population figure," but "be capped by actual needs" (New Mexico Br. 11). This standard superficially resembles the Indian homeland concept that was rejected in this case. The New Mexico concept, however, appears to be entirely detached from the original purposes for which the reservation was created and would require extensive speculation concerning the extent of the Indians' "actual" needs.

[44] The New Mexico communities, which provide no guidance on how to construct such a standard, overlook that the PIA standard itself was designed to measure, in their words, "the needs associated with the contemporaneous purposes for which Indian reservations were created."

virtually complete delegation to the lower courts to conduct a "Solomonic balancing of a myriad of factors" (Br. 18), which would apparently result in a different quantification standard for each reservation. The City of Phoenix, Arizona, argues, by contrast, that "[t]he Shoshone and Northern Arapaho federal reserved rights should * * * be quantified as the amount of water the tribes put to actual beneficial use on the Wind River Indian Reservation *under the laws of the State of Wyoming*" (Br. 3, emphasis added)—a standard that is essentially the converse of Wyoming's.

Thus, Wyoming and its amici are united in their opposition to the PIA standard, but they are unable to reach any agreement on an appropriate replacement. The standards that they propose have either been rejected by this Court, are manifestly inconsistent with the concept of a reserved water right, or are so vague as to provide no guidance at all. This is no accident. As this Court explained in *Arizona I*, the PIA standard is generally the "only feasible and fair way" to measure a water right that was reserved for the Tribes' future agricultural needs. Indeed, if the proposed alternative standards have a common theme, it is to require Indian Tribes to compete with non-Indians for water. Given the Indians' relative state of poverty and unemployment, they would inevitably lose that competition, and lose as well any hope of attaining self-sufficiency.

At bottom, Wyoming's (and its amici's) arguments simply confirm that *Arizona I* should continue to provide the general rule for measuring Indian reserved water rights. If the PIA test is not the exclusive basis for quantifying such water rights, it is certainly the essential baseline, and any party seeking to deviate from that baseline must demonstrate a compelling justification—drawn from the terms or implications of the relevant treaty, statute or executive order—for the departure. What circumstances might conceivably justify such a departure need not be decided here. In the case now before this Court, no adequate grounds for deviating from the PIA standard have been demonstrated.

C. The Retention Of The "Practicably Irrigable Acreage" Standard Of *Arizona I* Is Essential To Assure An Orderly, Efficient, And Certain Resolution Of This And Other On-going Indian Water Rights Disputes

We have explained the legal and logical force of the PIA standard. In addition, a central practical consideration, "the compelling need for certainty" (*Arizona II*, 460 U.S. at 620), forcefully counsels its retention and continued use. "Certainty of rights is particularly important with respect to water rights in the Western United States" (*ibid.*). Here, the interest in certainty manifests itself in three ways.

First, there is the need for certainty in the form of a final resolution of this litigation. This suit, which Wyoming initiated in its own courts, has consumed 12 years and substantial resources for all concerned. Relying on *Arizona I*, the Wyoming courts have completed a quantification of the Tribes' reserved rights based (with Wyoming's initial support) on the PIA standard. Changing the basic premise for quantification now—whatever alternative standard were adopted—would mean that the 12-year effort was for naught, and would require that the quantification begin anew.[45] This would be a particularly dramatic step here, where the Wyoming Supreme Court, the Wyoming district court, and the special master were in substantial agreement on the Tribes' entitlement. The intervening uncertainty would be a serious setback for both Indian and non-Indian development. See *Arizona II*, 460 U.S. at 620-621.

Second, there is a need for certainty with respect to Indian water rights adjudications generally. As a result of universal judicial adherence to *Arizona I* over the past 25 years, the PIA standard has generated significant expectations, reliance, and

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[45] The Court's concern in *Arizona II* that the "urge to relitigate, once loosed, will not be easily cabined" (460 U.S. at 625) is equally relevant here. The imposition of a new quantification standard would necessarily call into question all of the Wyoming courts' quantification rulings, including those matters that the Tribes themselves have raised in their cross-petition.

investment, both legal and financial. For example, it forms the basis of proof in ongoing litigation, or is the cornerstone of current settlement negotiations, in virtually all western water rights quantifications.[46] The abandonment of the PIA standard at this juncture would be a drastic setback to the orderly and efficient resolution of these disputes. Since any alternative standard would be subject to further judicial interpretation, there would commence a new era of legal uncertainty, retarding the preferred course of amicable settlement, fomenting additional litigation, and ultimately impeding the beneficial use of disputed waters.

Finally, there is the need for certainty and continuity in reserved water rights theory and practice. Consistent with *New Mexico*'s observation that the existence and size of a reserved

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[46] Such ongoing matters include: *In Re Gila River Adjudication*, Civ. Nos. W-1, W-2, W-3, W-4 (Maricopa County Super. Ct., Ariz., Consolidated 1981); *In re the General Adjudication of All Rights of Water Use in the Little Colorado River System and Source*, No. 6417 (Apache County Super. Ct., Ariz. 1978); *In Re Adjudication of Indian Water Rights in Water Division No. 7*, Civ. Nos. W-1603-1603-J, (Colo. Dist. Ct., Water Div. No. 7 1972); *In re the General Adjudication of Rights to the Use of Water from the Snake River Basin Water System*, Civ. No. 39576, (5th Dist., Twin Falls County, Idaho 1987); *United States* v. *Abousleman*, No. CIV-83-1041 SC (D.N.M. 1983); *New Mexico ex rel. Reynolds* v. *Aragon*, No. CIV-7941 SC (D.N.M. 1969); *New Mexico ex rel. Reynolds* v. *Abeyta*, No. CIV-7896 SC, CIV-7939 SC (D.N.M. 1969); *New Mexico ex rel. Reynolds* v. *Abbott*, No. CIV-7488 SC, CIV-8650 SC (D.N.M. 1968); *New Mexico ex rel. Reynolds* v. *Aamodt*, No. CIV-6639 M (D.N.M. 1966); *City of Gallup* v. *United States*, Civ. No. 84-164 (11th Dist., McKinley County, N.M. 1984); *New Mexico ex rel. Reynolds* v. *Kerr-McGee Corp.*, Nos. CB-83-190-CV, CB-83-220-CV, Consolidated (13th Dist., Cibola County, N.M. 1983); *New Mexico ex rel. Reynolds* v. *United States*, No. 75-184, (11th Dist., San Juan County, N.M. 1975); *New Mexico ex rel. Reynolds* v. *Lewis*, Nos. 20294, 22600 Consolidated (5th Dist., Chavez County, N.M. 1956); *In the Matter of the Adjudication of the Existing Rights to the Use of All the Water, Both Surface and Underground, in All the Water Basins in the State of Montana* (initiated by petition of the Montana Attorney General in the Montana Supreme Court 1979, adjudication of Indian rights in Montana State Water Courts suspended pending ongoing negotiations); *In re Confederated Tribes of the Warm Springs Indian Reservation, Oregon* (not filed, negotiations begun in 1987); *Washington* v. *Acquavella*, Civ. No. 77-2-01485-5 (Yakima County Super. Ct., Washington 1977).

water right is a "question of implied intent" (*New Mexico*, 438 U.S. at 698), the PIA standard has its source in the documents—whether they be treaties, statutes, or executive orders—by which the reservation was established. Hence, a reserved right quantified by use of the PIA standard ultimately rests upon congressional or executive intent. Furthermore, it is measured through an objective process based on scientific, engineering, and economic information.

Should this Court decide to abandon the PIA standard as the touchstone for quantifying the water reserved for the agricultural uses of Indians, it would be confronted with the problem of devising a suitable replacement. Consideration of this side of the problem confirms this Court's wisdom in adopting the PIA standard in *Arizona I*. That is perhaps most persuasively shown by the cacophony displayed in the briefs of the *amici curiae* and of Wyoming itself. In the 25 years since the *Arizona I* decision, the western States and their political subdivisions have yet to develop a principled alternative to the PIA standard.

At bottom, this case presents a clear choice—as much as any lawsuit can—between stability and disorder. We urge the former.

CONCLUSION

The judgment of the Supreme Court of Wyoming should be affirmed.

Respectfully submitted.

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APRIL 1989

In the Supreme Court of the United States

OCTOBER TERM, 1960

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, DEFENDANTS

THE UNITED STATES OF AMERICA AND STATE OF NEVADA, INTERVENERS

STATE OF UTAH AND STATE OF NEW MEXICO, IMPLEADED DEFENDANTS

Simon H. Rifkind, *Special Master*

REPORT

December 5, 1960

* * * * *

IV. The Claims of the United States to Water in the Mainstream of the Colorado River

The United States claims, in addition to control of the mainstream by reason of the Boulder Canyon Project Act and its ownership and management of the various dams and works which regulate mainstream water, the use of water in the Lower Basin for a variety of its projects and needs. The United States urges that it has reserved water for the use of the various Indian Reservations, National Forests, Parks, Recreational Areas, Monuments, Memorials and lands under the control of the Bureau of Land Management located in the Lower Basin. The United States also claims the right to fulfill its treaty obligations by delivering 1,500,000 acre-feet of water per annum in the Colorado River at the Mexican border, and by consuming water on wildlife refuges and management areas located in the Lower Basin. Finally, the United States claims the right to deliver water from Lake Mead to Boulder City, Nevada, pursuant to a federal statute.

A. Indian Reservations

The United States argues that it has reserved water flowing in the Colorado River and its tributaries in the Lower Basin for the needs of all of the Indian Reservations located within the Lower Basin. Thus the United States claims that each Indian Reservation has the right to divert and consume the amount of water necessary to irrigate all irrigable acreage on the Reservation and to satisfy related needs, subject only to the priority of appropriative rights established before a particular Reservation was created and water reserved for its benefit.

Arizona argues that the rights of the various Indian Reservations on the tributaries ought not to be adjudi-

cated in this case.[1] I agree with Arizona that there is no need in this litigation to adjudicate the rights or priorities of Indian Reservations diverting water from the Lower Basin tributaries, except for the Gila River. For the reasons detailed at pages 318-321, 323-324, *infra*, it would be inappropriate at this time to apportion water in any of these tributaries, except the Gila River. Moreover, it would certainly be inappropriate to attempt a determination of the rights and priorities between each Indian Reservation and the myriad individual users who divert water from these tributaries.[2] As to Indian Reservations on the Gila River System, I have made recommendations concerning the United States claims in a subsequent section of this Report at pages 332-334.

As to the mainstream Indian Reservations, I have concluded that it is necessary to determine their water rights, and I have done so in the Findings of Fact and Conclusions of Law which conclude this section of the Report. The United States claims it has reserved mainstream water for Indian Reservations under federal law, independently of the state law of appropriation, in quantities sufficient to irrigate all the irrigable acreage in each of the Reservations and to satisfy related uses. Arizona and California resist this claim. Arizona asserts that the quantity of water reserved for an Indian Reservation is no more than that amount necessary to satisfy the requirements of Indians living on the Reservation at any particular time. California also denies that the United States intended to reserve water for all irrigable lands on an Indian Reservation.[3]

This disagreement presents a justiciable controversy between the United States and the States of Arizona and California which ought to be adjudicated in this case in order

[1] Ariz. Answering Brief, pp. 92-108.
[2] See Tr. 13796-13810.
[3] Calif. Brief, pp. 177-195; Calif. Response to U. S., pp. 112-127.

that the Secretary may know how much water he may release for consumption on each Indian Reservation. Thus in periods when there is insufficient water for the Secretary to fulfill all of his delivery obligations to users in a particular state, he will have to satisfy them according to priority. In such a case it will be necessary for him to know the rights and priorities of Indian Reservations as against other users within the state.[4] What these rights and priorities are can be determined only by resolving the controversy between the United States and the States of Arizona and California over the validity and scope of the reservations of mainstream water which the United States claims to have made. Indeed, if the Indian Reservations can acquire water rights only pursuant to state law, the Secretary may be prohibited from delivering any mainstream water to some of them since, so far as the evidence shows, some of the Reservations have never complied with the formalities required by the applicable state law in order to obtain a water right. Furthermore, the claims of the United States to water from the Colorado River for the benefit of Indian Reservations are of such great magnitude that failure to adjudicate them would leave a cloud on the legal availability of substantial amounts of mainstream water for use by non-Indian projects.

Since the Secretary cannot know how to operate Hoover Dam and the mainstream works below unless the controversy between the United States and the States of Arizona and California is resolved, since failure to adjudicate it will leave non-Indian users in doubt as to the water available for their use, and since this controversy has been prop-

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[4]It should be noted that, under similar circumstances, the Secretary may need to know the water rights intrastate of other users. In the case of the California agencies who are parties to this suit these rights are set out in the Seven-party Agreement. Such rights of other users not parties to this suit obviously cannot be determined herein.

erly presented in this case, it is appropriate to adjudicate it here.

The United States claims are sustained.

It has been established that the United States has the power to reserve water for the benefit of an Indian Reservation, created out of public lands, and that such a reservation of water creates a water right good against subsequent appropriators even if they beneficially use the water before the Reservation uses it. In short, the United States has the power to create a water right appurtenant to such lands without complying with state law. *Winters* v. *United States*, 207 U. S. 564 (1908), involved a suit by the United States on behalf of the Fort Belknap Indian Reservation, which was created by treaty between the United States and various Indian tribes on May 1, 1888. The land set apart for the Indians under the treaty was arid, but susceptible of sustaining agriculture if irrigated from the Milk River, a non-navigable stream which formed the northern border of the Reservation. The Court found that it was the intention of the United States and the Indians that the Indians should settle on the Reservation and change from a nomadic to a "pastoral and civilized people." 207 U. S., at 576. Subsequent to the establishment of the Indian Reservation, the defendants in the case acquired lands along the Milk River upstream from the Reservation under the Desert Land Act, 19 Stat. 377 (1877), by settling on the land and putting it to productive use by irrigation with water diverted from the Milk River. Some of the defendant farmers diverted water from the Milk River and obtained appropriative rights thereto under the Desert Land Act and the local law of Montana as early as 1895. 143 Fed. 740, 742 (1906). According to the opinion of the Circuit Court of Appeals, the Indians were diverting, at the time of trial, 5,000 miners' inches of water, most of which they began to use after appropriative rights of some of the defendants

had vested. The United States successfully sued to enjoin the upstream farmers from interfering with the flow of water to the Fort Belknap Reservation.

The Supreme Court affirmed the trial court's holdings that "there was reserved to said Indians the right to use the water of Milk River to an extent reasonably necessary to irrigate the lands included in the reserve created by the said treaty . . .," and that the defendants would be enjoined from interfering with the flow of 5,000 miners' inches of Milk River water to the Reservation. 143 Fed., at 743. The Supreme Court thus held that the reservation of water was effective as of the date that the Fort Belknap Reservation was created, 207 U. S., at 577, and that the appropriative rights obtained by the defendants subsequent to the time that the water was reserved but prior to the time that it was put to use on the Reservation were subordinate to the Reservation's rights.

The Supreme Court supported this result with the following reasoning, at p. 577:

> "The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. . . . That the Government did reserve them we have decided, and for a use which would be necessarily continued through the years."

The *Winters* case has been cited many times as establishing that the United States may, when it creates an Indian Reservation, reserve water for the future needs of that Reservation, and that appropriative water rights of others established subsequent to the reservation must give way when it becomes necessary for the Indian Reservation to utilize additional water for its expanding needs. *United States* v. *Powers*, 305 U. S. 527 (1939); *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U. S. 988 (1957); *United States*

v. *Walker River Irrigation District*, 104 F.2d 334 (9th Cir. 1939); *Conrad Investing Co.* v. *United States*, 161 Fed. 829 (9th Cir. 1908). In the *Winters* case the United States exercised its power to reserve water by a treaty; but the power itself stems from the United States' property rights in the water, not from the treaty power. Since the United States has the power to reserve water, by treaty, against appropriation under state law, there is no reason why it lacks the power to do so by statute or executive order. In the *Walker River* case, the Court of Appeals squarely held that the United States had reserved water for an Indian Reservation which had been created by executive order.

It is unnecessary, for the purposes of this case, to explore the origin or limits of such power to reserve water against subsequent appropriators. The authorities cited above sufficiently sustain the validity of such a reservation to preserve the Indians' rights here under consideration.

The question to be decided, therefore, as to each Indian Reservation which can divert water from the mainstream of the Colorado River is whether the United States exercised the power to reserve such water for the Reservation's future needs. As stated in the *Walker River* case, 104 F. 2d, at 336:

> "The power of the Government to reserve the waters and thus exempt them from subsequent appropriation by others is beyond debate. . . . The question is merely whether in this instance the power was exercised."

The United States need not expressly reserve waters for the benefit of an Indian Reservation; an implied reservation is effective. Indeed, in all of the cases cited above, including *Winters* v. *United States* itself, the intent to reserve water was never explicitly stated at the time the Indian Reservation was established; rather that intent was implied from the circumstances surrounding the creation of the Reservation. In the present case I have found that the

United States intended to reserve mainstream water for the reasonable future needs of the following Indian Reservations: Chemehuevi, Cocopah, Yuma, Colorado River and Fort Mohave. As to each it is apparent that it was intended that the Indians would settle on the Reservation land and develop an agricultural economy. The land, however, is too arid to support such an economy without irrigation from the Colorado River. It would be unconscionable for the United States to have coerced or induced Indians onto a Reservation without providing the water necessary to make the lands habitable. I refuse to accept this possibility as to any of the mainstream Indian Reservations since there is no evidence as to any of them that such was the case. As the Court of Appeals stated in the *Walker River* case, at page 339: "It would be irrational to assume that the intent was merely to set aside the arid soil without reserving the means of rendering it productive."

Also, wherever I have found an intent to reserve water, I have inferred, absent evidence to the contrary, that the reservation was not limited to the needs of the population then resident upon the land, nor to the acreage being irrigated when the Reservation was created. I have concluded that enough water was reserved to satisfy the future expanding agricultural and related water needs of each Indian Reservation. Invariably the United States intended that the Indian tribes settled on a Reservation would remain there for generations, and the possibility that other Indians would be settled on the Reservation could not be excluded. Certainly the possibility of expanding populations, expanding agricultural development, and hence expanding water needs must have been apparent at the time each Reservation was created. It is unreasonable to attribute to the United States an intention or an expectation that the Indians would remain stagnant or die out when they were settled on a Reservation. Since the Indians could remain

on these Reservations and develop their society and economy only if water from the Colorado River was available to meet their future needs, I have found that the United States, when it reserved water, reserved it for all of such needs.

This conclusion comports with the holdings in the three cases decided by the Court of Appeals for the Ninth Circuit which are cited above. As that Court stated in *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321, 327 (9th Cir. 1956):

> "It is plain from our decision in the *Conrad Investing Co.* case, *supra*, that the paramount right of the Indians to the waters of Ahtanum Creek was not limited to the use of the Indians at any given date but this right extended to the ultimate needs of the Indians as those needs and requirements should grow to keep pace with the development of Indian agriculture upon the reservation."

The conclusion reached here is also consistent with the holding in the *Winters* case that the upstream farmers could not interfere with uses on the Indian Reservation which were initiated subsequent to the farmers' diversions.

The suggestion is unacceptable that the United States intended that the Indians would be required to obtain water for their future needs by acquiring appropriative rights under state law. The Indians were not an agricultural people and it was necessary for them to develop their agricultural skills after settling on the Reservations. It must have been apparent that if they were thrown into competition with the more advanced non-Indians in a race to acquire rights to water by putting it to beneficial use, they would have lost the match before it was begun. Rather than assuming that the United States intended to put the Indians in the position of having to leave their Reservations as their water needs increased if they were unable to satisfy these needs by acquiring appro-

priative rights under state law, I have concluded that reservations of water by the United States included enough to supply expanding needs regardless of state water law.

This brings us to the question of quantity. This is sharply debated, and many conflicting views have been advanced. I have concluded that the United States effectuated the intention to provide for the future needs of the Indians by reserving sufficient water to irrigate all of the practicably irrigable lands in a Reservation and to supply related stock and domestic uses. The magnitude of the water rights created by the United States is measured by the amount of irrigable land set aside within a Reservation, not by the number of Indians inhabiting it. At the times of the creation of the five Indian Reservations in question, it was impossible to predict the future needs of the Indians who might inhabit them. Indeed, in some instances it was not clear which Indian tribes would ultimately be settled on a particular Reservation. What the United States did, in withdrawing public lands for these Indian Reservations, was to establish areas that could be used in the indefinite future to satisfy the needs of Indian tribes in the United States as those needs might develop. It follows from this that the United States intended to reserve enough water to make the lands productive, in other words, enough to irrigate all of the practicably irrigable acreage. Only by reserving water in this manner could the United States ensure that the Reservation lands would be usable when needed to support an Indian economy. This conclusion is also supported by the fact that the irrigable land originally withdrawn for each of the five Indian Reservations was considerably more extensive than was necessary to support the Indians who inhabited the Reservations immediately after their establishment. The only explanation for this withdrawal of excess irrigable acreage is that the United States intended it to be utilized in the future.

It must have been apparent that unless the United States reserved water for the land at the time of withdrawal, there might be no water left to appropriate at the time that the land was needed for the purposes for which it was withdrawn.

Arizona argues that the United States reserved water for the Indians themselves and not for the lands withdrawn for a Reservation. Arizona seems to envisage that the United States intended to create water rights in gross which would fluctuate in magnitude as the Indian population and needs fluctuated, the water right being measured by the amount of water needed at any particular time by the Indians actually inhabiting a particular Reservation. As pointed out above, the more sensible conclusion is that the United States intended to reserve enough water to irrigate all of the practicably irrigable lands on a Reservation and that the water rights thereby created would run to defined lands, as is generally true of water rights.

But even if Arizona were correct in her contention, the most feasible way to give full effect to the water rights created by the United States, as Arizona defines them, would be to decree to each Reservation enough water to irrigate all of the practicably irrigable acreage. It is clear that the water rights of the five Reservations in question cannot be fixed at present uses for this would defeat the basic purpose of reserving water to meet future requirements. Even if, as Arizona argues, the reservation of water was in gross for Indians and not Reservation lands, the Indians' needs may well increase in the future and these increased needs would have to be provided for. Thus, under the Arizona theory, there are two possible methods of framing the decree in this action, other than in terms of irrigable acreage.

One possibility would be to adopt an open-end decree, simply stating that each Reservation may divert at any

particular time all the water reasonably necessary for its agricultural and related uses as against those who appropriated water subsequent to its establishment. However, such a limitless claim would place all junior water rights in jeopardy of the uncertain and the unknowable. Financing of irrigation projects would be severely hampered if investors were faced with the possibility that expanding needs on an Indian Reservation might result in a reduction of the project's water supply. Moreover, it would not give the United States any certainty as to the extent of its reserved rights, which would undoubtedly hamper the United States in developing them. Since, under the Arizona theory, United States water rights vary with changes in Indian population, the planning of works to serve future needs would be difficult because the United States could never know whether sufficient water to operate the works economically would be legally available.

The other possibility, which would avoid the serious disadvantage of creating uncertainty as to the extent of the reserved rights, would be to predict the ultimate needs of each Reservation and to decree that much water for its future uses. The shortcoming of this solution, however, lies in the difficulty of predicting the future needs of Indian Reservations. Failure to foresee expanding requirements would result in a forfeiture of the Indians' water rights and would stultify development of the Reservations. Whether it is ever possible accurately to predict the future needs of an Indian Reservation, it is clearly not possible in this case where the attention of the parties has been directed to a great many complex and important issues quite apart from those relating to the Indians. Whatever might be possible in a case involving solely the issue of the reserved rights of a

single Indian Reservation,[8] it would not be possible to predict future Reservation needs in this litigation.

Therefore, the most feasible decree that could be adopted in this case, even accepting Arizona's contention, would be to establish a water right for each of the five Reservations in the amount of water necessary to irrigate all of the practicably irrigable acreage on the Reservation and to satisfy related stock and domestic uses. This will preserve the full extent of the water rights created by the United States and will establish water rights of fixed magnitude and priority so as to provide certainty for both the United States and non-Indian users.

The amount of water reserved for the five Reservations, and the water rights created thereby, are measured by the water needed for agricultural, stock and related domestic purposes. The reservations of water were made for the purpose of enabling the Indians to develop a viable agricultural economy; other uses, such as those for industry, which might consume substantially more water than agricultural uses, were not contemplated at the time the Reservations were created. Indeed, the United States asks only for enough water to satisfy future agricultural and related uses. This does not necessarily mean, however, that water reserved for Indian Reservations may not be used for purposes other than agricultural and related uses. The question of change in the character of use is not before me. I hold only that the amount of water reserved, and hence the magnitude of the water rights created, is determined by agricultural and related requirements, since when the water was reserved that was the purpose of the reservation.

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[8]Even in such cases, courts have not attempted to bind the Indians on the basis of a prediction as to future needs. See Conrad Investment Co. v. United States, 161 Fed. 829 (9th Cir. 1908).

The water rights established for the benefit of the five Indian Reservations and enforced in the recommended decree are similar in many respects to the ordinary water right recognized under the law of many western states: They are of fixed magnitude and priority and are appurtenant to defined lands. They may be utilized regardless of the character of the particular user. Thus Congress has provided for the leasing of certain Reservation lands to non-Indians,[6] and these lessees may exercise the water rights appurtenant to the leased lands. *Skeem* v. *United States*, 273 Fed. 93, 96 (9th Cir. 1921). The measurement used in defining the magnitude of the water rights is the amount of water necessary for agricultural and related purposes because this was the initial purpose of the reservations, but the decree establishes a property right which the United States may utilize or dispose of for the benefit of the Indians as the relevant law may allow. See *United States* v. *Powers*, 305 U. S. 527 (1939).

[6]See 26 Stat. 794 (1891), 31 Stat. 229 (1900), 39 Stat. 128 (1916), 41 Stat. 1232 (1921) and, the general leasing statute presently in force, 69 Stat. 539 (1955), 25 U. S. C. § 415 (Supp. 1959), 25 U. S. C. §§ 415a-d (1958).

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In The

Supreme Court of the United States

October Term, 1988

The State of Wyoming,
Petitioner,

v.

United States of America,
Shoshone Tribe and Northern Arapaho Tribe
of the Wind River Indian Reservation, *et al.*,
Respondents.

On Writ of Certiorari to the
Supreme Court of Wyoming

BRIEF FOR TRIBAL RESPONDENTS

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QUESTION PRESENTED

In *Arizona v. California*, 373 U.S. 546 (1963), this Court quantified the water reserved for farming purposes when the five Indian reservations at issue in that case were established. In quantifying the reserved water, this Court, after considering other proposed quantification standards, ruled that the practicably-irrigable-acreage standard—awarding "enough water . . . to irrigate all the practicably irrigable acreage"—was "the only feasible and fair way by which reserved water for the reservations can be measured." *Id.* at 600, 601. This standard was selected, as the Court later summarized, because it "allowed a present water allocation that would be appropriate for future water needs." *Arizona v. California*, 460 U.S. 605, 617 (1983).

The question presented is:

Whether the Wyoming courts erred by using the practicably-irrigable-acreage standard in quantifying the water reserved for farming purposes when the Wind River Indian Reservation was established pursuant to the Second Treaty of Fort Bridger, Act of July 3, 1868, 15 Stat. 673.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

Nos. 88-309

THE STATE OF WYOMING,
Petitioner,

v.

UNITED STATES OF AMERICA,
SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE
OF THE WIND RIVER INDIAN RESERVATION, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Wyoming

BRIEF FOR TRIBAL RESPONDENTS

STATEMENT OF THE CASE

This case concerns the water reserved for the Shoshone and Northern Arapaho Indian Tribes under the Second Treaty of Fort Bridger, Act of July 3, 1868, 15 Stat. 673, pursuant to which the Wind River Indian Reservation was set apart as a permanent homeland—originally for the Shoshone Tribe and, later, for both the Shoshone and the Northern Arapaho Tribes (the "Tribes").

History of the Wind River Indian Reservation

In 1868, the United States and the Shoshone Tribe, which were military allies and had long maintained friendly relations, entered into the Second Treaty of Fort Bridger (the "1868 Treaty"). 15 Stat. 673; Petitioner's Appendix ("Pet. App.") 9a, 793a. Under its terms, the parties "set apart" a tract of land—approximately

3,054,182 acres—in what was later to become the State of Wyoming "for the absolute and undisturbed use and occupation of the Shoshonee Indians . . . and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them." 1868 Treaty art. 2. The Shoshone Tribe agreed to make this reservation, now known as the Wind River Indian Reservation (the "Reservation"), its "permanent home." *Id.* art. 4. The Tribe further agreed to "relinquish all title, claims, or rights" to a vast tract of 44,672,000 acres of land in what are now the States of Wyoming, Colorado, and Utah that had been delineated as "Shoshonee country" in an earlier treaty, the First Treaty of Fort Bridger, 18 Stat. 685 (Part 3) (1863). 1868 Treaty art. 2; Pet. App. 9a.

The Shoshones had been a nomadic people dependent upon hunting and fishing for their subsistence. Pet. App. 9a, 617a-18a, 686a. Accordingly, they faced an enormous transition in converting from their nomadic ways to life on the Reservation.

An important purpose of the 1868 Treaty was to assist the Shoshones in making this transition by "help[ing] to create an independent permanent farming community upon the reservation." *United States v. Shoshone Tribe*, 304 U.S. 111, 118 (1938). In various provisions of the 1868 Treaty, arts. 3, 6-10, 12, the United States agreed to assist and encourage the Indians to "commence cultivating the soil for a living," such as by providing those Indians who "shall desire to commence farming" with seeds, farming implements and instruction, and individual allotments of Reservation land, arts. 6, 8.

The United States had permitted the Shoshones, whose "loyalty . . . to the people of the United States has been conspicuous and unfaltering," *Shoshone Tribe v. United States*, 299 U.S. 476, 486 (1937), to select the lands that were to comprise the Reservation. Petition ("Pet.") 4. The Shoshones selected lands that were ideally suited for

irrigated farming. Although the Reservation is "located in a rather arid portion of central Wyoming," *United States v. Mazurie*, 419 U.S. 544, 546 (1975), and its rainfall is inadequate to support farming without irrigation, Pet. App. 211a, its streams and rivers are fed by the ample run-off from the Wind River Mountains. Indeed, the lands selected by the Shoshones were in "the choicest and best-watered portion of Wyoming" and included "fertile river valleys conveniently irrigable." *United States v. Shoshone Tribe*, 304 U.S. at 114. These lands were reserved under the 1868 Treaty as the permanent homeland of the Shoshones before the Territory of Wyoming was created and more than twenty-one years before Wyoming was admitted into the Union in 1890.

In 1878, the Northern Arapahoes were permanently settled by the United States on the Reservation, Pet. App. 9a-10a, and the Reservation has since been the permanent homeland for both the Shoshone and the Northern Arapaho Tribes.

In 1872 and 1896, the Tribes agreed to cede to the United States certain portions of the original Reservation in return for cash payments. Pet. App. 409a-10a. These cessions reduced the Reservation to its current size of approximately 2.5 million acres.[1] *Id.* at 533a.

History of Irrigation Development on the Reservation

The transition to Reservation life proved to be slow and difficult, and, notwithstanding the ample water and fertile lands on the Reservation, the early attempts of the Indians to develop a farming economy failed. *Id.* at 10a. Indeed, by 1895 the Tribes had become totally dependent on the United States for food, clothing and shel-

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[1] The Wind River Reservation is the third largest Indian reservation in the United States, Bureau of Indian Affairs, Lands Under Jurisdiction of the Bureau of Indian Affairs 4-31 (1984), and comprises an area larger than the States of Delaware and Rhode Island combined.

ter. *Id.* These economic misfortunes compelled the Tribes to sell a portion of the Reservation in the 1896 cession as a means of raising desperately needed cash. *Id.*

In 1904 the Tribes, still experiencing substantial problems in developing a farming economy, entered into an agreement with the United States (the "1904 Agreement") pursuant to which the northern two-thirds of the Reservation were to be made available for land sales to non-Indians.[2] The 1904 Agreement was ratified by Congress in the Act of March 3, 1905 (the "1905 Act"), 33 Stat. 1016; Pet. App. 769a, and the northern portion of the Reservation was opened to non-Indian settlement in 1906.[3] 34 Stat. 3208 (Part 3).

Because the legal status of Indian reserved water rights had not been resolved at the time of the 1904 Agreement —four years before this Court's decision in *Winters v. United States*, 207 U.S. 564 (1908)—, federal officials and the Tribes sought to secure additional protection under state law for the water rights of the Indians in the event that their reserved rights under the 1868 Treaty were not sustained by the courts.[4] Pet. App. 28a-29a.

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[2] Under the 1904 Agreement, the United States was not obligated to sell any of the opened lands, but simply agreed to "act as trustee for said Indians to dispose of said lands and to expend for said Indians and to pay over to them the proceeds received from the sale thereof only as received." 33 Stat. 1018.

[3] Land sales under the 1905 Act fell far short of expectations; less than ten percent of the opened lands were purchased. Pet. App. 412a-13a. The Secretary of the Interior discontinued such sales in 1934, and later "restored" the unsold lands to tribal ownership. *Id.* at 413a. The opening of the northern portion of the Reservation to non-Indian settlement under the 1905 Act did not result in a disestablishment of that portion of the Reservation. *Id.* at 31a-32a, 417a-19a.

[4] This concern arose as a result of two pressing considerations in 1904: (1) the non-Indians who would soon be entering the Reservation under the 1904 Agreement would immediately begin the race to the stream under the state-law doctrine of prior appropriation, and (2) this race was to begin when there was necessarily "some

Accordingly, under the 1904 Agreement, a portion of the Indians' proceeds from the sales of their land—if any balance remained after other specified payments were made—was earmarked for acquiring protective state water rights.[5] Between 1905 and 1915, federal officials obtained protective state water permits on behalf of the Indians to irrigate approximately 145,000 acres of land.[6] Wyoming Brief ("Br.") 5. Permits for the vast majority of this acreage were obtained in 1905, the year before the Reservation was opened to non-Indian settlement. J.A. (Wyo. Sup. Ct.), Vol. VII, 520-22.

After this Court decided *Winters*, federal officials began asserting reserved water rights under the 1868 Treaty on the Reservation, while also continuing to pursue pro-

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uncertainty in the status of Indian water rights" before this Court's 1908 ruling in *Winters*. Pet. App. 28a. If the courts later determined that there were no reserved water rights under the 1868 Treaty, and the Indians had not secured protective state water rights, the Indians would have lost the race before it began.

[5] Article III of the Agreement (as later incorporated in the 1905 Act) provided that, of the total proceeds derived from the sale of Indian lands, $85,000 was to be devoted to making a per capita payment of $50 dollars to each Indian, and

> any balance remaining [of the $85,000 sum after the per capita payments were made] shall at once become available and shall be devoted to surveying, platting, making of maps, payment of the fees, and the performance of such acts as are required by the statutes of the State of Wyoming in securing water rights from said State for the irrigation of such lands as shall remain the property of said Indians, whether located within the territory intended to be ceded by this agreement or within the diminished reserve.

33 Stat. 1017. Under Article IV of the Agreement, $150,000 of the Indians' proceeds was earmarked for the construction of irrigation projects. Pet. App. 772a.

[6] This is the figure asserted by Wyoming, and the Tribes accept it as approximately correct, though it may be subject to relatively minor adjustments—downward for certain duplicative permits and upward for permits obtained by others besides the United States. No findings were made by the state courts as to the amount of Indian permitted acreage because Wyoming's present "ample opportunity" argument was not litigated there.

tective state permits. Pet. App. 30a. In 1911, a dispute arose when the State Water Commissioner closed the headgates on an allottee's ditches, claiming that the allottee did not have a valid state permit. *Id.* The United States later filed suit asserting reserved water rights under the 1868 Treaty, and the federal district court enjoined the Commissioner from interfering with the rights of the Indian farmer.[7] In 1926, the United States again filed suit to protect the reserved water rights of allottees on the Reservation, and the federal district court expressly recognized the existence of reserved water rights under the 1868 Treaty.[8]

Over the years, the United States has provided a total of $4.4 million to construct and maintain Indian irrigation projects on the Reservation.[9] As a result of this limited financial support and the hard work of Indian farmers, there are more than 54,000 acres of historically irrigated Indian land. Pet. App. 463a-531a. But the fed-

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[7] Bill of Complaint, United States v. Hampleman, No. 753 (D. Wyo.) (Sept. 5, 1913), J.A. (Wyo. Sup. Ct.) Vol. VIII, Ex. 2 at 3 ("[I]t was the intention of the parties to said treaty that all water within the boundaries of said reservation . . . should be reserved for the perpetual use of said Indians."); United States v. Hampleman, No. 742 (U.S.D.C. Wyo. June 25, 1916) (ruling that the water rights of the Indians "are within the absolute and exclusive jurisdiction" of the United States) (reproduced as Exhibit A to the Tribes' Opp. Cert.).

[8] United States v. Parkins, 18 F.2d 642, 643 (D. Wyo. 1926) ("The treaty in this case, like all other treaties with the Indians creating reservations, contemplates the use and benefit of the lands within the reservation to its wards, the Indians, which likewise includes the irrigation of those lands, they being arid in character. Winters v. United States, 207 U.S. 564.").

[9] Wyoming provides a figure of some $2.3 million, Br. 5, but the Tribes do not wish to understate the full extent of federal support, which was a total of $4.4 million from 1905 through 1987. Special Irrigation Report and Recommendations Prepared for the Deputy to Assistant Secretary--Indian Affairs (Trust and Economic Development), July 1988. The Tribes were apparently required to reimburse the United States for at least some of these federal expenditures. *See* Act of August 1, 1914, 38 Stat. 582, 608.

eral goal of irrigating some 145,000 acres of Indian land has fallen far short of achievement, and today there remains at least another 54,000 acres of Indian land that is practicably irrigable but for which irrigation works have not been constructed. *Id.* at 532a-80a; 229a-30a.

The United States also has subsidized non-Indian irrigation development on the Reservation, but to a much greater extent. Non-Indians now irrigate 120,000 acres within the Reservation, Br. 4, including some 73,000 acres in the Riverton Reclamation Project, an almost exclusively non-Indian federal irrigation project withdrawn from the opened portion of the Reservation in 1921. Riverton Cross-Pet., No. 88-553, at 2; 41 Stat. 1367, 1404. The United States has spent more than $70 million on the Riverton Reclamation Project alone since its inception.[10]

History of the Adjudication

The State of Wyoming initiated this adjudication of the Tribes' reserved water rights under the Treaty more than a decade ago in Wyoming's own state courts in connection with a general adjudication of water rights in the Big Horn River Basin. The United States and the Tribes sought to defeat the State's choice of forum, but these efforts were strenuously and successfully opposed by the State. Pet. App. 11a-12a, 720a-23a.

In May 1979, the state district court appointed a Special Master approved by all the parties to conduct the adjudication. The Master divided the proceeding into three phases. The first phase—the only one at issue here—was a determination of reserved rights under the 1868 Treaty. On December 15, 1982, after extensive discovery and a lengthy trial, *id.* at 13a-14a, the Master signed his 451-page Report and Proposed Decree regarding the water reserved for the Tribes. *Id.* at 367a.

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[10] Bureau of Reclamation, U.S. Dep't of Interior, 1984 Summary Statistics, Vol. III, Project Data at 309.

The Decisions Below

Rejecting the State's argument that water had not been reserved, the Master, relying upon *Winters* and its progeny, ruled that "Congress, by the Treaty of 1868, impliedly created a reservation for water on the Wind River Indian Reservation to satisfy the purposes of that Treaty." *Id.* at 432a. The Master also rejected the State's argument that the so-called "water proviso" to the 1905 Act (*see supra* note 5) was inconsistent with or had abrogated the reserved right under the 1868 Treaty. *Id.* at 411a-20a, 436a-37a. The Master held that the purpose of the Treaty was to permit the Indians to develop the Reservation as a self-sustaining "permanent homeland" —a purpose that included, but was not limited to, the development of a farming economy on the Reservation. *Id.* at 441a-42a. Accordingly, the Master ruled that the reserved water included that necessary not only for irrigated farming but also for certain non-agricultural uses, including mineral development, municipal uses and fisheries. *Id.*

With regard to the Treaty's purpose of promoting irrigated farming, the Master, relying on *Arizona v. California*, 373 U.S. 546, 601 (1963), determined that the appropriate measure of the reserved right was the amount of water necessary to irrigate the Reservation's practicably irrigable acreage (the "PIA standard"). Pet. App. 532a. The major parties had agreed to a definition of "practicably irrigable acreage," [11] and Wyoming itself had urged the Master to apply the PIA standard. *See infra* pp. 29-30. In its pretrial pleadings, Wyoming asserted

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[11] The Master—pursuant to an agreement among the State, the United States, and the Tribes—defined "practicably irrigable acreage" as "those acres susceptible to sustained irrigation at reasonable costs." Pet. App. 534a. The Master explained that the PIA standard requires a "two part analysis": (1) whether the land is "susceptible to sustained irrigation" from the perspective of arability and engineering feasibility, and (2) whether the land is irrigable "at a reasonable cost." *Id.* The Master held that, in applying the PIA standard, current irrigation technology—as opposed to that in existence in 1868—should be used. *Id.* at 535a.

that there were some 102,000 practicably irrigable acres on the Reservation;[12] however, at trial, Wyoming challenged the vast majority of the some 150,000 acres claimed by the United States or the Tribes. Pet. App. 532a. The Master, after weighing the conflicting expert testimony, ruled against Wyoming on much of its rebuttal case regarding the amount of practicably irrigable acreage.[13] He concluded that there were some 54,000 practicably irrigable acres of so-called "historic" lands—land that was then or had previously been irrigated,[14] *id.* at 463a-531a, 643a-72a—and some 48,000 acres of "future lands"—land that had not been previously irrigated but was held to be practicably irrigable as parts of proposed irrigation projects.[15] *Id.* at 695a. The Master also quantified the water reserved under the 1868 Treaty for non-irrigation purposes. *Id.* at 696a-702a.

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[12] Wyoming's Response to the United States' Statement of Claims and to the Statement of the Shoshone and Arapahoe Tribes Concerning the Measurement of Tribal Reserved Water Rights, ¶¶ 17 and Appendix A (July 16, 1980) ("Wyoming's Response") (reproduced herein at Appendix A, pp. 4a-5a, 6a.) Wyoming asserted that there were 101,931 practicably irrigable acres requiring 323,176 acre feet of water per year. The acreage included 34,726 "historic" acres and 67,205 acres of "future lands." *Id.*

[13] The Master generally found that the evidence and testimony presented by the United States was "professional, competent, believable." *See* Pet. App. 495a; *see also id.* at 468a-69a, 471a, 473a, 474a, 539a, 545a, 549a, 553a, 555a-56a, 563a, 567a, 569a, & 575a. Nonetheless, the Master rejected some 50,000 acres that either the United States or the Tribes had contended at trial was practicably irrigable. *Id.* at 72a.

[14] The historic lands also included some 1,400 acres of arable, undeveloped land within existing irrigation projects. Pet. App. 471a-74a, 500a-02a.

[15] The Master recommended that the decree limit the construction of irrigation projects for the future lands to no more than ten percent of the total acreage in each subsequent decade, unless upstream storage was first constructed. Pet. App. 580a-84a. The district court rejected this recommendation. *Compare id.* at 234a-37a and 267a *with id.* at 194a-98a and 200a-01a.

The district court largely accepted the Master's recommendations, including the use of the PIA standard. *Id.* at 121a-31a, 168a-279a. But the district court adopted a narrower view of the purposes for which water had been reserved. *Id.* at 219a. Having concluded that "the sole purpose of the Reservation was [to promote Indian] agriculture," *id.* at 220a, the court reduced the total amount of reserved water to only that determined by the PIA standard. *Id.* at 221a.

The Supreme Court of Wyoming, affirming the district court, held that there was "an intent to reserve water" under the Treaty, *id.* at 26a; that the reserved right was not inconsistent with or abrogated by the water proviso of the 1905 Act, *id.* at 28a-32a, and that it was "correct [to] quantify[] the Tribes' reserved water right by the amount of water necessary to irrigate all of the reservation's practicably irrigable acreage." *Id.* at 47a. Contrary to the Master's recommendation, the Supreme Court of Wyoming, by a vote of three to two, affirmed the district court's ruling regarding the purpose of the Reservation, holding that "the intent at the time [of the Treaty was] to create a reservation with a sole agricultural purpose." *Id.* at 38a. The majority thus affirmed the reduction of the amount of water reserved for the Tribes to only that quantified under the PIA standard.[16]

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[16] The Supreme Court overturned the district court's adoption of the Master's recommendation that the total amount of practicably irrigable "future lands" be reduced by ten percent to provide for a "margin of error." Pet. App. 56a-58a. The court reasoned that the reduction was inappropriate because "a margin of error works both ways." *Id.* at 57a.

In light of this ruling and certain stipulations among the parties, the final amount of reserved rights recognized by the state supreme court was 500,717 acre-feet for 108,221 acres of practicably irrigable land. This figure comprises 290,490 acre-feet for 54,216 acres of historically irrigable land, and 210,227 acre-feet for 54,005 acres of future lands. *See* Pet. App. 56a-58a, 172a, 182a, 531a, 559a, 580a.

The Court's Grant of Certiorari

Wyoming sought review of three issues in its petition for a writ of certiorari. Pet. at (i). This Court limited its grant of certiorari to the second issue: whether the Wyoming courts had erred by using the PIA standard to quantify the water reserved for farming purposes under the 1868 Treaty. 109 S. Ct. 863 (1989). One of the excluded issues was whether the water proviso to the 1905 Act was inconsistent with or had abrogated the reserved water right under the 1868 Treaty. Pet. at (i).

SUMMARY OF THE ARGUMENT

This Court has long recognized the existence and certain key characteristics of Indian reserved water rights. In *Winters v. United States*, 207 U.S. 564, 576-77 (1908), in *United States v. Powers*, 305 U.S. 527, 533 (1939) and again in *Arizona v. California*, 373 U.S. 546, 600 (1963) ("*Arizona I*"), this Court held that, when land is reserved to create an Indian reservation, there is also an implicit reservation for the use of the Indians of such previously unappropriated water as is needed to fulfill the purposes of the Indian reservation. These reserved water rights "vest[]" and become "effective" when an Indian reservation is created, in an amount necessary "to satisfy the future as well as the present needs" of the Indian reservation. *Arizona I*, 373 U.S. at 600. This vested property right is based not on notions of "judicial equity," *Arizona v. California*, 460 U.S. 605, 616 (1983) ("*Arizona II*"), but rather on the intent of the parties at the time the reservation was established.

In *Arizona I*, this Court addressed the same question presented here: how to quantify the water reserved for the present and future irrigation needs of an Indian tribe. After rejecting an equitable balancing approach and one based on the "reasonably foreseeable needs" of the Indians, the Court adopted the PIA standard, ruling

that it was "the only feasible and fair way by which reserved water for the reservations can be measured." 373 U.S. at 600, 601. The PIA ruling in *Arizona I* was "hotly contested by the States, who argued that the [PIA standard was] a much too liberal measure." *Arizona II*, 460 U.S. at 617. Since then, this Court has repeatedly cited with approval to the PIA ruling in *Arizona I*, and has rebuffed two attempts by states to overrule that decision. *Cappaert v. United States*, 426 U.S. 128, 139 n.4 (1976); *Arizona II*, 460 U.S. at 625-26.

Wyoming here strikes at the heart of this Court's jurisprudence regarding Indian reserved water rights. Wyoming pays homage to the now-familiar complaints of some states that the PIA standard is neither "feasible" nor "fair" and wreaks havoc upon non-Indian water users. But Wyoming's true colors are best seen in the relief it is seeking: a limitation of the reserved right to water for historically irrigated acreage for which there are no protective state permits. The requested relief reveals that Wyoming's point is not that the PIA standard is an inappropriate means of quantifying water for present and future irrigation needs, but rather that the Tribes should not have any reserved water either for future irrigation needs or for lands covered by protective permits.

This Court should affirm the holdings of the Wyoming courts that the PIA standard is the appropriate measure of the reserved right under the 1868 Treaty for the farming needs of the Tribes. Wyoming admits that this Court's PIA ruling in *Arizona I* appeared to be a "universal standard." Br. 14. But Wyoming asserts that this case is distinguishable on its facts from *Arizona I* and that, in any event, the PIA ruling has been eroded by subsequent decisions of this Court. Neither point is correct, as even Wyoming acknowledged when it endorsed the PIA standard at the outset of this proceeding.

Wyoming's attempt to turn back the hands of time to before *Winters* should also be rejected. The argument that the reserved right should be limited to historic levels of irrigation flies in the face of this Court's consistent holdings for more than eighty years. It also rests on the wholly unsupported, and indeed shameful, premise that what Wyoming describes as "massive" infusions of federal expenditures on Indian irrigation projects—some $4.4 million, compared to more than $70 million in federal support for only one of the non-Indian irrigation projects on the Reservation—have provided the Tribes with an "ample opportunity" to reach full irrigation development. Wyoming's argument regarding the protective state permits is similarly devoid of merit, was specifically rejected over sixty years ago by the federal district court in Wyoming, and runs counter to this Court's most fundamental rules of Indian treaty interpretation.

What Wyoming seeks here is to change the rules that have governed the adjudication of Indian water rights not only since this Court's 1963 ruling in *Arizona I* but also since its 1908 ruling in *Winters*. Such a change is unwarranted, and would result in an extraordinary injustice to Indian tribes that have justifiably relied on this Court's prior decisions.

This Court has repeatedly admonished Indian tribes for failing to respect "the compelling need for certainty" in Western water-rights adjudications, *Arizona II*, 460 U.S. at 620; *Nevada v. United States*, 463 U.S. 110, 129 n.10 (1983); and has also underscored that "[s]ubstantive rules governing the law of real property are peculiarly subject to the principle of *stare decisis*." *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 381 (1977). These concerns apply with at least equal force to the arguments advanced here by Wyoming. The ruling below should be affirmed.

ARGUMENT

I. Wyoming Is Wrong in Contending that Its Own State Courts Have Inflicted an Injustice upon Wyoming's Non-Indian Water Users.

Wyoming labors mightily to create the impression that the quantification by its own state courts of the Tribes' reserved water right has unjustly disturbed the reasonable expectations of Wyoming's non-Indian water users. This suggestion is simply not true.[17] Because Wyoming has seriously distorted the facts, a few corrections are in order before turning to the question presented.

First, Wyoming seeks to create the impression that this proceeding is the first instance in which the United States or the Tribes have asserted the existence of reserved water rights under the 1868 Treaty. Br. 19-20. This suggestion is wholly unfounded. Wyoming has failed to disclose that, as the Supreme Court of Wyoming noted (Pet. App. 28a-31a), federal officials asserted reserved water rights on behalf of the Tribes soon after this Court's *Winters* ruling in 1908, have done so repeatedly since then, and twice—in 1916 and 1926—have sought and obtained relief from the federal district court in Wyoming to protect those rights. Indeed, Wyoming fails to disclose that—contrary to one of its principal arguments here—the federal district court more than sixty years ago expressly recognized that there are reserved water rights under the 1868 Treaty for Indian lands covered by protective state permits.[18] In short, it

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[17] In any event, this Court has repeatedly rejected the argument that reserved water rights are based on "an equitable doctrine calling for a balancing of competing interests." *E.g.*, Cappaert v. United States, 426 U.S. 128, 138-39 (1976); *see infra* pp. 32-34.

[18] In United States v. Parkins, 18 F.2d 642 (D. Wyo. 1926), the court enjoined a non-Indian from diverting water from a federal irrigation project that had been constructed to serve the Indians and for which federal officials had secured protective state water

is Wyoming—not the United States or the Tribes—that is seeking to rewrite history in these proceedings.

Second, by failing to quote the "water proviso" of the 1905 Act in its entirety, Br. 19, and then by simply mischaracterizing it, *id.* at 31 n.43, Wyoming seeks to create the impression that the proviso was a decision by Congress to defer to Wyoming law for the acquisition of all water rights for the Reservation.[19] Wyoming has dog-

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permits. In so ruling, the district court acknowledged that "it is apparently the fact that *the Indian service*, in promulgating its irrigation project *and the officials of the state of Wyoming* for the purpose of protecting all landowners who may acquire water rights, *have co-operated along the line of taking out water for irrigating purposes with the consent of the state.*" *Id.* at 643 (emphasis added). But the district court concluded:

> It must be assumed, however, in the absence of any specific grant [to the State], that the government has reserved whatever rights may be necessary for the beneficial use of the government in carrying out its previous treaty rights; those rights having become fixed and established before the act of admission which made Wyoming a sovereign state. The treaty in this case, like all other treaties with the Indians creating reservations, contemplates the use and benefit of the lands within the reservation to its wards, the Indians, which likewise includes the irrigation of those lands, they being arid in character.

Id., citing *Winters*. Thus, notwithstanding the protective state permits, the court recognized the existence of the water rights reserved under the 1868 Treaty.

[19] Wyoming asserts that, in enacting the water proviso, "Congress expressly directed that all actions be taken 'as are required by the statutes of the State of Wyoming in securing water rights from said State' for the Reservation." Br. 31 n.43 (emphasis deleted). Here, as in Wyoming's selective quotation of the proviso, *id.* at 19, Wyoming seeks to rewrite the proviso by failing to acknowledge that, by its express terms (*see supra* note 5), the proviso only governed how a portion of the Indians' own proceeds was to be spent if any balance remained after other specified payments were first made, and had no force beyond that. As confirmed by the legislative history and contemporaneous administrative interpretation of the 1905 Act, Congress enacted the proviso not, as Wyoming suggests, to require that all water rights for the Reserva-

gedly pursued this argument throughout this proceeding, but it was rejected at every level of Wyoming's own state-court system and excluded from this Court's grant of certiorari. As the Wyoming courts correctly held, the proviso was simply a pre-*Winters* safeguard pursuant to which a portion of the Indians' own funds was earmarked to secure protective state water rights in the event that the courts might later fail to recognize the Indians' reserved rights under the 1868 Treaty. Pet. App. 28a-32a.

Third, Wyoming argues that the amount of the reserved right quantified by the Wyoming courts based on the PIA standard—enough water to irrigate 108,000 acres—is excessive and unfair to non-Indian water users because the Indians have in the past irrigated no more than 54,000 acres. Br. 31-35. This complaint is belied by Wyoming's own position at the outset of this proceeding, when Wyoming asserted that there were 102,000 practicably irrigable acres of Indian land, including 67,000 acres of future lands. *See supra* note 12. Moreover, from an historical perspective, the amount of PIA —108,000 acres—is less than the irrigation goal of federal officials who obtained protective state permits for 145,000 Indian acres between 1905 and 1915. Br. 5. Indeed, because permits for 125,000 of those acres were obtained in 1905,[20] the year before the Reservation was opened to non-Indian settlement, the non-Indians who settled on the Reservation were on notice that federal

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tion be acquired under state law, but rather to honor the prudent pre-*Winters* request of the Tribes and federal officials to earmark some of the Indians' own proceeds from land sales to acquire protective state water rights. Pet. App. 28a-31a; Tribes' Opp. Cert. 19-25. Congress made similar arrangements for securing protective water rights on other Indian reservations prior to *Winters*. *See, e.g.*, United States v. McIntire, 101 F.2d 650, 654 (9th Cir. 1939) (Flathead Indian Reservation); *infra* pp. 42-43 (Colorado River Indian Reservation).

[20] Joint Appendix (Wyo. Sup. Ct.), Vol. VII, at 520-22.

officials intended to irrigate far more than 108,000 acres of Indian land, and with water rights senior to the 1906 state priority dates held by most non-Indian irrigators on the Reservation.[21] In sum, contrary to the distorted impression created by Wyoming's fanciful statement of the case,[22] there is nothing unfair about the ruling below.

Fourth, Wyoming vastly overstates any impact that the ruling below may have upon the water available to current non-Indian water users. As a result of the ample run-off from the Wind River Mountains, the Reservation is in the "best-watered portion of Wyoming." *Shoshone Tribe*, 304 U.S. at 114. The Supreme Court of Wyoming held that here—unlike some instances involving reserved water rights—there is "no indication" that the use by the Tribes of their reserved water would cause a "gallon

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[21] *See infra* note 22. Some of the land covered by the 1905 permits has been sold by allottees to non-Indians. Under the state supreme court ruling, the non-Indian parties here who succeeded to 1905 state priority dates by acquiring lands from Indian allottees were permitted to obtain 1868 Treaty-based rights upon a proper showing on remand. Pet. App. 73a-74a.

[22] Wyoming's statement of the case is riddled with inaccuracies and distortions. Space constraints and Wyoming's failure to provide any citations to the record (contrary to this Court's Rule 34.1(g)) preclude a line-by-line correction, but two examples warrant mention. First, contrary to the impression Wyoming creates (Br. 4) that the Riverton Reclamation Project has a state-law priority date of 1905, the priority date both for that project and for the two other predominantly non-Indian projects on the Reservation—LeClair-Riverton and Riverton Valley—is 1906, all junior to the protective state permits for 125,900 acres acquired by federal officials on behalf of the Tribes in 1905. Plaintiff's Exh. WRIR MC-1, MV-3A and C-23327, and Master's Exh. 1. Second, contrary to Wyoming's description of the protective permits as "perfected state-awarded water rights," Br. 6, a permit under Wyoming law is simply permission to appropriate and is not a perfected right until the water is put to beneficial use and a certificate of appropriation is issued. *See* Wyo. Stat. Ann. §§ 41-4-501-512 (1985 & Supp. 1988). Even after the State has issued a certificate of appropriation, as it has done here for some Indian lands, the state water right may be lost through subsequent non-use. *Id.*

for gallon reduction in the water available for other [water] users." Pet. App. 71a. The Master, who was concerned that the full exercise by the Tribes of their 1868 Treaty rights "may" have an adverse effect on many non-Indian appropriators,[23] *id.* at 630a, noted that, with additional storage, the full exercise of those rights would have "virtually no adverse effect upon existing state water users of the Big Horn Basin."[24] *Id.* at 627a, 635a n.39.

Finally, the most egregious mischaracterizations in Wyoming's brief are those relating to events not disclosed

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[23] Wyoming sought to quantify the claimed adverse effect upon existing water users if the Tribes were to exercise their full 1868 rights. Pet. App. 631a-35a. In reviewing Wyoming's proof, the Master commented that he was "left . . . with a distinct feeling that the inputted assumptions were carefully crafted to secure the desired print outs." *Id.* at 633a. The Master noted that Wyoming's proof left "myriad doubts" but no answers to questions such as: "How much of an adverse effect on the junior rights? How much of an effect on [pre-statehood] territorial[] [water rights]?" *Id.* at 632a. The Master ultimately concluded that the full exercise of the reserved rights of the Tribes "may" have an adverse effect upon non-Indian water users, *id.* at 630a, but was unable to quantify any such effect. *Id.* at 632a-34a.

In its original Finding of Fact 98, the district court found that "the construction of any one or all of the future projects would have an adverse effect on other water users." Pet. App. 258a. But, as even Wyoming acknowledges, Br. 8, a subsequently assigned district judge later deleted that finding. Pet. App. 169a.

[24] By recent agreement, the State and the Tribes have taken interim steps to increase the water available to both Indian and non-Indian water users, and have agreed to enter into long-term negotiations to further the same objective. *See infra* note 27.

In any event, should any disruption of non-Indian water uses occur as a result of the Indians' use of their full PIA water entitlement, Wyoming can avail itself of a congressional remedy in light of Congress's broad power over Indian tribes. *See generally* Cherokee Nation v. Georgia, 36 U.S. (5 Pet.) 1 (1831); United States v. Kagama, 118 U.S. 375 (1886). Congress can act quickly and decisively to fund new water storage or to authorize other appropriate remedies, as it has done several times in approving Indian water-rights settlements. *See* Brief of Amici Native American Rights Fund *et al.*

in the record regarding the current relations between the Tribes and the State. Wyoming seeks to create the impression that the Tribes and the State are on the verge of open warfare. In fact, the relations between these sovereigns are now the best they have ever been, and hold much promise for the future. Only two months ago, the Tribes and the State entered into an agreement that was then described by the State as "a precedent-setting example of tribal-state cooperation on water and tax matters."[25] Appendix B hereto, at 9a. The agreement resolves for the next year the two most significant disputes between the State and the Tribes: (1) overlapping state and tribal taxation of oil and gas production on the Reservation,[26] and (2) water allocations. Interim Agree-

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[25] This cooperation was also evident during last summer's drought when a dispute arose regarding water allocations among Indian and non-Indian irrigators in one portion of an irrigation project on the Reservation. The Tribes and the State, working under an agreement signed by the Governor and the Chairmen of the Tribal Business Councils, persuaded the Bureau of Indian Affairs to make certain changes in water management that resulted in all water users' receiving their full water entitlements. (The agreement between the State and the Tribes is reproduced in Exhibit B of the Tribes' Opp. Cert. 3a-4a).

The "sting" that Wyoming suggests its non-Indian water users have already felt from the rulings below (Br. 9) was a three-week disruption in water deliveries that occurred while the State, the Tribes, and the United States were negotiating a resolution of last summer's dispute on the portion of that one irrigation project. The dispute arose because non-Indian irrigators had taken more than their fair share of the water from the project at the beginning of the summer. Moreover, as acknowledged by Wyoming's Governor and the Chairmen of the Tribal Business Councils, the dispute was "*not* the result of an actual shortage of water supply, but rather [was] the result of problems with the management of the water supply and of the need for structural improvement in the irrigation and delivery system." Agreement at 1 (emphasis added) (Exhibit B to Tribes' Opp. Cert. at 3a). Finally, significant steps have been taken to avoid a recurrence of this type of problem during the upcoming irrigation season. *See infra* note 27.

[26] Prior to the interim agreement, oil and gas production on the Reservation was subject to a state severance tax of six percent, a

ment ¶¶ 1-5 (reproduced herein at Appendix C). An important objective of the interim agreement is to provide an opportunity for the Tribes and the State to negotiate a long-term solution to these two disputes, with the assistance and financial support of the federal government. *Id.* at ¶¶ 9-10.

It is disappointing to the Tribes that Wyoming's litigators have sought here to obtain an advantage from this important step towards a negotiated resolution of these longstanding issues; it is even more disappointing that they have done so by blatantly mischaracterizing the agreement. The agreement does not, as Wyoming alleges here, relate only to water issues, Br. 10, 35, but rather resolves for the next year the disputes relating to both taxation and water.[27] When Wyoming's Governor signed

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county ad valorem tax of approximately seven percent, and a tribal tax of four percent. There has been a long-standing dispute regarding this overlapping taxation, and several oil companies have paid in excess of $10 million in state severance taxes under protest over the past decade. A recent study conducted by a national economic consulting firm retained by the Tribes revealed that during the period between 1979 and 1987—a period during which the Reservation's oil and gas reserves have been seriously depleted—the State and County collected $56 million more in taxes on the Reservation than they spent on services to the Reservation as a whole. Riverton (Wyo.) Ranger, Aug. 3, 1988, at 1. The Tribes contend that this state and county taxation has been unlawful.

[27] Wyoming asserts that, under the agreement, it has "agreed to forego tax revenues from the Reservation and provide other funds in the amount of $5,500,000, *simply to prevent the Tribes' enforcement of their Federal reserved water right during 1989*." Br. 10 (emphasis added). While it is true that the agreement resolves water allocations on the Reservation for this next year, it does far more, and Wyoming's litigators are well aware of that.

The State has secured the agreement of the Tribes during the next year "not [to] seek to enjoin or otherwise hinder the collection of any remaining state or county taxes on oil and gas production on the Reservation." Interim Agreement ¶ 5. The Tribes could have brought suit or amended their own tax ordinance, which would have forced the Reservation oil and gas taxpayers to pay the Fremont County ad valorem tax into an escrow account, reducing the County's revenues by almost $4 million in 1989. In the interim

the interim agreement, he described it as "a historic first step" towards "facilitat[ing] the negotiation of a long-term settlement of the *tax and water* issues on the reservation," a step that "signifie[d] the strong desire of both the state and the tribes to resolve our disputes over *water and taxes* amicably and fairly for all parties." Appendix B, at 7a (emphasis added). In spite of the unfortunate treatment of these events here by Wyoming's litigators, the Tribes still join the hope expressed by the State that the parties will be able "to reach such an agreement during the coming year." *Id.* at 8a.

II. The Wyoming Courts Did Not Err by Using the PIA Standard To Quantify the Water Reserved Under the 1868 Treaty for the Purpose, as Recognized by This Court in *United States v. Shoshone Tribe*, 304 U.S. 111, 118 (1938), of "Help[ing] To Create an Independent Permanent Farming Community upon the Reservation."

In *Arizona I*, this Court addressed the same question presented here: how to quantify the water reserved for

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agreement the State bargained for, and received, an agreement from the Tribes not to take such steps during the next year.

The agreement also includes important steps to prevent a recurrence of the type of water dispute that arose last summer, *see supra* note 25, and to increase the amount of water available for all water users. The agreement provides that "[t]he Tribes and the State, in coordination with the Bureau of Indian Affairs, shall cooperate in jointly monitoring and managing water allocations on the Reservation," and requires that $1,000,000 of the total payment to the Tribes be used "for rehabilitation and expansion of existing water delivery systems within the Reservation." Interim Agreement ¶¶ 2, 6. The expenditure of these funds will result in the availability of more water to both Indian and non-Indian irrigators. Moreover, the agreement earmarks $300,000 for studies of water-storage sites on the Reservation and additional improvements to the water-delivery systems. *Id.* at ¶ 8. These studies will seek to determine how to improve the availability of water for all water users. The interim agreement contemplates that any long-term agreement will include additional water storage and rehabilitation of existing water-delivery systems, and provides that "[t]he Tribes and the State agree to cooperate in seeking federal funding to offset these costs." *Id.* at ¶ 10.

the present and future irrigation needs of an Indian tribe. The Court, after considering and rejecting other proposed standards, ruled that the PIA standard was "the only feasible and fair way by which reserved water for the reservations can be measured." 373 U.S. at 600, 601. The PIA standard, as this Court later summarized, was selected because it "allowed a present water allocation that would be appropriate for future water needs." *Arizona II*, 460 U.S. at 617.

This Court's PIA ruling in *Arizona I* was correct; it is fully consistent with prior and subsequent decisions of this Court, and this case is indistinguishable from *Arizona I*. Accordingly, the Wyoming courts were correct in using the PIA standard.

A. The PIA Standard, as This Court Ruled in *Arizona I*, Is the Most Appropriate Means for Deriving a Fixed Present Determination that Adequately Measures the Irrigation Needs Not Only of the Present Indian Population but Also of Future Generations.

In *Arizona I*, which involved five agricultural Indian reservations on or near the Colorado River, this Court agreed with the Master's conclusion that the PIA standard was the most appropriate means of quantifying the water reserved for irrigated farming. The Court first ruled that water had been reserved "to satisfy the future as well as the present needs of the Indian Reservations." *Id.* at 600. The Master had reasoned that, because the Indian reservations were created to be permanent tribal homelands, the United States must have intended to reserve water for the irrigation needs not only of the current Indian populations but also of future generations.[25]

The Court in *Arizona I* next addressed the question presented here: how to measure the reserved right in a manner that would allow, as later described in *Arizona*

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[25] Report of Simon H. Rifkind, Special Master, Arizona v. California, No. 8 Original, at 260-61 (Dec. 5, 1960) ("Master's Report").

II, "a fixed present determination of future needs for water." *Arizona II*, 460 U.S. at 623 (emphasis omitted). The Court considered and rejected two quantification standards proposed by Arizona, one involving a balancing of Indian and non-Indian interests,[29] and the other based on the Indians' " 'reasonably foreseeable needs,' which, in fact, means [a quantification based on] the number of Indians." 373 U.S. at 600-01. The Court rejected the latter because it would not yield a fixed present determination that adequately measured the irrigation needs of future Indian generations, for "[h]ow many Indians there will be and what their future needs will be can only be guessed." *Id.* at 601.

The Court then held that the PIA standard—a measure based on the farming potential of the Indian reservations—was the most appropriate means for deriving a fixed present determination of the irrigation needs of the Indians that would be adequate not only for their present populations but also for future generations. *Id.* at 600-01. Such a standard, as the Master had noted, was consistent with the intent in establishing these reservations: to create permanent Indian homelands based on self-sustaining farm economies. Master's Report at 262-63. The Master had also concluded that the PIA standard "will preserve the full extent of the water rights created by the United States and will establish water rights of fixed magnitude and priority so as to provide certainty for both the United States and non-Indian users." *Id.* at 265. This Court agreed, concluding that the PIA standard was "the only feasible and fair way by which reserved water for the reservations can be measured." 373 U.S. at 601.

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[29] 373 U.S. at 596-97 (rejecting Arizona's argument that the doctrine of equitable apportionment—"a method of resolving water disputes between States"—should be used in quantifying the reserved water rights of the Indians).

B. This Case, as the Wyoming Courts Correctly Held, Is Indistinguishable from *Arizona I*.

There is no meaningful distinction between this case and *Arizona I*. This Court has already recognized that an important purpose of creating the Reservation under the 1868 Treaty, as was true of the reservations in *Arizona I*, was to "help to create an independent permanent farming community upon the Reservation." [30] *Shoshone Tribe*, 304 U.S. at 118. This Court has also noted that the Reservation, as was true of those in *Arizona I*, is located in a "rather arid" region. *United States v. Mazurie*, 419 U.S. 544, 546 (1975). Thus, here, as in *Arizona I*, "water from the river [is] essential to the life of the Indian people . . . and the crops they raised." 373 U.S. at 599; Pet. App. 211a. Moreover, here, as in *Arizona I*, a population-based determination of the irriga-

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[30] The 1868 Treaty reveals an express intent to promote farming on the Reservation. The head of each Indian family who desired to "commence farming" was entitled to select a 320-acre tract, and each individual over eighteen not the head of a family was entitled to select an 80-acre tract "for purposes of cultivation." 1868 Treaty art. 6. These individuals and families were entitled to retain their tracts "so long as he or they may continue to cultivate it." *Id.* They were also entitled, upon a showing that they "intend[ed] in good faith to commence cultivating the soil for a living," to "receive seeds and agricultural implements" worth $100 in the first year of farming and $25 in each of the next three years, art. 8. The United States agreed to provide training to those Indians who shall "commence farming" and, for the first three years, to provide incentive payments to the ten Indians that grew "the most valuable crops," arts. 8, 12.

Although an important purpose of the 1868 Treaty was to promote irrigated farming, the principal purpose was to create a self-sustaining permanent Indian homeland a purpose that includes, but is not limited to, irrigated farming. Tribes' Cross-Pet. in No. 88-492, at 11-18. Accordingly, although the Tribes contend that the PIA standard is the proper standard for measuring irrigation needs, the Tribes also contend that other standards are appropriate to measure the non-irrigation needs of the Reservation.

tion needs of future generations would be based on sheer speculation.[31]

In addition, this Court has held that the terms of the 1868 Treaty "are to be construed in the sense in which naturally the Indians would understand them." *Shoshone Tribe*, 304 U.S. at 116; *accord Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943). In light of the terms of the 1868 Treaty and its history, particularly the fact that the United States permitted the Shoshones to select a permanent home that included "fertile river valleys conveniently irrigable" in the "best-watered portion of Wyoming," 304 U.S. at 114, there can be no doubt that they "naturally . . . would [have] under[stood]" that, at the very least, their people, including future generations, would be permitted to use all the water needed to take advantage of the full farming potential of the Reservation.[32]

Wyoming asserts that there are "three obvious distinctions between the *Arizona I* reservations and the Wind River Indian Reservation." Br. 24. Each of these is easily dismissed. Wyoming first notes that the Indian reservations in *Arizona I* were comprised of "desert" lands, whereas "the Wind River Reservation comprises 'the best-watered portion of Wyoming.'" Br. 24-25. The implication seems to be that, unlike the reservation lands in *Arizona I*, the lands on the Wind River Reservation

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[31] The Indian population on the Reservation increased significantly in the past generation, from some 3,100 tribal members in 1950, Tr., Vol. IV, 407 (Jan. 1981), to some 4,500 in 1980, *see infra* note 66; and, according to projections accepted by the Master, the resident Indian population is expected to more than double to 9,740 in 2020. *Id.* The Indian population on the Reservation thus has been and will continue to be increasing dramatically, and any present population-based determination of the irrigation needs for the many generations beyond the year 2020 would be sheer speculation.

[32] Indeed, the most likely understanding of the Shoshones was that they were entitled to all the water from the streams on the Reservation.

will support farming without water for irrigation.[33] But this suggestion is simply untrue, and the district court expressly found to the contrary.[34]

Wyoming's second purported distinction is that the reservation lands in *Arizona I* were located in areas not considered to be "desirable," whereas the Shoshones, who were military allies of the United States, had requested the Wind River Reservation and received it from the United States as a "gift."[35] Br. 25. This is an odd point for Wyoming to highlight. The issue here turns on the intent of the parties to the 1868 Treaty, and the natural inference to be drawn from this supposed "distinction" is, if anything, that the parties to the 1868 Treaty would have intended a more generous reservation of water than that intended when the less "desirable" lands in *Arizona I* were reserved.

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[33] If Wyoming's point is simply that more water is required to irrigate an acre in the Southwest than is required on the Wind River Reservation, the PIA standard takes that altogether unremarkable "distinction" into account, and indeed the Shoshones and Northern Arapahoes received much less water per acre than the tribes in *Arizona I*. Those tribes received 905,496 acre-feet of water for 136,636 irrigable acres, Arizona v. California, 376 U.S. 340, 344-45 (1964), whereas the Tribes here received 500,717 acre-feet of water for 108,221 irrigable acres. *See supra* note 16.

[34] The streams on the Reservation receive ample run-off from the snowpack and glaciers of the Wind River Mountains, but rainfall during the growing season is sparse. As the district court found, "[m]uch of the reservation land was arid. The water was needed for irrigation and was essential to the raising of crops." Pet. App. 211a.

[35] Wyoming's suggestion that the Shoshones received the Reservation as a "gift" is both incorrect and offensive. In selecting the Reservation and agreeing to make it their permanent home, the Shoshones relinquished their claims to the vast tract of 44,672,000 acres delineated as "Shoshonee country" in an earlier treaty. As the Supreme Court of Wyoming recognized, the Big Horn Basin was "part of the vast hunting grounds of the peripatetic Shoshone Indians." Pet. App. 9a. Accordingly, as this Court held in United States v. Winans, 198 U.S. 371, 381 (1905), "the treaty was not a grant of rights to the Indians, but a grant of rights from them."

Finally, Wyoming argues that *Arizona I* is to be distinguished because, at the time that the Indian reservations in *Arizona I* were established, it was not then known which Indian tribes would live thereon, whereas "the Wind River Reservation was set aside specifically for the Shoshone Indians." Br. 25-26. This is no basis for distinguishing this case from *Arizona I*. As the Master in *Arizona I* noted, only in "*some* instances it was not clear which Indian tribes would ultimately be settled on a particular Reservation";[36] in any event this point was not even mentioned in this Court's decision in *Arizona I*. Moreover, at the time the Wind River Reservation was established, it was contemplated that other Indian tribes might be settling there and making additional demands upon its water; 1868 Treaty, art. 2; and, since 1878, the Reservation has served as the permanent homeland not only for the Shoshones but also for the Northern Arapahoes. *Shoshone Tribe*, 299 U.S. at 494-95.

Wyoming's "obvious distinctions" are, thus, at best, distinctions without a difference. As the Wyoming courts correctly held, this case is indistinguishable from *Arizona I*.[37]

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[36] Master's Report 262 (emphasis added).

[37] Wyoming's attempt here to retry its failed PIA case, Br. 39-47, is not a question properly before this Court, and, in any event, was fully and fairly considered by its own state courts. Wyoming's further claim that the PIA standard is not "feasible" is fully answered by the Amici Native American Rights Fund *et al.* ("NARF"), and we understand will also be addressed by the United States. Suffice it to say here that the PIA standard provides a relatively objective standard that has worked reasonably well for resolving Indian water-rights disputes both in and out of court. Moreover, in a number of cases where the PIA standard has been applied, significant Indian economic development has resulted without any loss of water to non-Indian water users. *See* NARF Brief. The alternative standards proposed by Wyoming and the state amici would result in considerable uncertainty and confusion in the litigation and settlement of Indian water-rights disputes.

C. Wyoming Has Advanced No Persuasive Reason Why the Wyoming Courts Should Not Have Applied the PIA Standard in This Case.

1. *The Post-*Arizona I *Cases Relied upon by Wyoming Are Entirely Consistent with and Indeed Cite Approvingly to the PIA Ruling in* Arizona I.

Although acknowledging that the PIA ruling in *Arizona I* established what appeared to be a "universal standard," Br. 14, Wyoming asserts that it is at odds with this Court's "substantially different quantification approach[]" in three subsequent cases. *Id.* at 11. But these post-*Arizona I* decisions have not eroded the PIA standard. As even Wyoming admits (*id.* at 11 n.12), these later decisions cite approvingly to and draw support from this Court's PIA ruling in *Arizona I*.

Two of the cases relied upon by Wyoming concerned the water reserved for federal reservations. *Cappaert v. United States*, 426 U.S. 128, 141 (1976), a case concerning a national monument reserved to protect a unique fish species, is said to conflict with the PIA ruling because, in *Cappaert*, the Court noted that the district court had properly tailored its injunction to the "minimal need" for reserved water: the amount necessary to preserve the fish. Br. 13. *United States v. New Mexico*, 438 U.S. 696, 700 (1978), is said to conflict because, according to Wyoming, the Court there limited the reserved right to the water necessary to prevent the national forest's primary purpose from being "entirely defeated." Br. 13.

Neither of these cases is in conflict with *Arizona I*. In both *Cappaert* and *New Mexico*, the Court cited with approval to the PIA ruling in *Arizona I* for the proposition that the proper measure of a reserved right is "only that amount of water necessary to fulfill the purpose of the reservation, no more." *Cappaert*, 426 U.S. at 141; *New Mexico*, 438 U.S. at 700. There was no express or implied criticism of the PIA standard, for *Arizona I* is

cited as supporting and being fully consistent with the result reached in both cases. Indeed, in *Cappaert* the Court's discussion of "minimal need" is preceded by a reference to the PIA standard.[38]

Wyoming itself has recognized that the PIA ruling in *Arizona I* is entirely consistent with *Cappaert* and *New Mexico*. In its pretrial pleadings, Wyoming equated "the minimal amount of water necessary to prevent the purposes of the Reservation from being entirely defeated"—the phrases from *Cappaert* and *New Mexico* that Wyoming now asserts are at odds with the PIA standard—with "a supply of water . . . for the irrigation of all practicably irrigable land on said Reservation."[39] Moreover, Wyoming admitted that, if a reserved right existed, that

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[38] In *Cappaert*, the Court's citation with approval to the PIA ruling in *Arizona I* appears at the beginning of the paragraph that concludes with the Court's observation that it was proper for the district court to tailor the injunction protecting the reserved right to "minimal need." 426 U.S. at 141. Thus, in relying upon *Arizona I*, the Court in *Cappaert* was apparently equating the PIA standard with the measure of "minimal need" for the irrigation requirements of an Indian tribe. Rather than criticizing *Arizona I*, the Court in *Cappaert* expressly reaffirmed it. 426 U.S. at 139 n.4.

In *New Mexico*, the Court observed, as Wyoming emphasizes, that "[e]ach time this Court has applied the 'implied-reservation-of-water doctrine,' it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated." 438 U.S. at 700. But, since *Arizona I* is cited for that proposition, *id.* at 700 n.4, the Court's observation in *New Mexico* is not at odds with the PIA ruling. Moreover, when read in context, the Court's observation—and indeed the issue presented and the ruling in the case—relates not to the quantification of reserved rights but rather to a determination of the purposes for which water was reserved. *Id.* at 700-02. With respect to the issue of quantification, the Court in *New Mexico* cited approvingly to the PIA ruling in *Arizona I*, just as the Court in *Cappaert* had done. *Id.* at 700.

[39] Wyoming's Response, ¶¶ 11-14, 17; Appendix A hereto, at pp. 3a-5a.

right included water for the irrigation of all the Reservation's practicably irrigable land.[40] Thus, at the outset of this proceeding, even Wyoming was able to reconcile *Cappaert* and *New Mexico* with the PIA ruling in *Arizona I*. Accordingly, Wyoming should not be permitted now to complain that the United States and the Tribes failed to show the "minimal need" for water to prevent the purposes of the Reservation from being "entirely defeated." Wyoming had equated such a showing with the PIA standard, and the United States and the Tribes made such a showing at trial.

Nothing in the decisions in *Cappaert* and *New Mexico*, both of which involved federal reservations, should limit the reserved rights of the Shoshones and Northern Arapahoes. This case involves vested property rights to water reserved under a federal treaty for the needs of a permanent homeland for two Indian tribes, not the water reserved for a federal reservation to protect pupfish or trees. There are powerful arguments militating against a restrictive approach to the quantification of Indian reserved water rights.[41]

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[40] Wyoming "admit[ted] that, if a reserved water right was created on behalf of the Wind River Indian Reservation, *it was created solely to provide the Indians living thereon with a supply of water* for domestic uses, *for the irrigation of all practicably irrigable land on said Reservation*, and for stockwatering uses." Wyoming's Response, at ¶ 14; Appendix A hereto, at p. 4a (emphasis added).

Wyoming even argued strongly in favor of the PIA standard. Wyoming asserted to the Master that "the amount of the water necessary to irrigate all the practicably irrigable acreage . . . is the sum of the reserved water right, if any, on the Wind River Reservation, *and must govern in this case*." Wyoming's Brief in Support of Its Response to the Claims for Water Rights of the United States and the Shoshone and Arapahoe Tribes at 47 (emphasis added); Appendix D hereto, at pp. 20a-21a. *See also* State's Proposed Special Master's Report (Part I) (April 9, 1982), p. 34; Wyoming's Brief on Objections to Special Master's Report (Mar. 18, 1983), p. 27.

[41] Water is typically reserved for an Indian tribe not by unilateral federal action but by a bilateral treaty—such as the 1868 Treaty in this proceeding—in which the reasonable expectations of the In-

The third case cited by Wyoming as marking a departure from *Arizona I—Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (*"Fishing Vessel"*)—involved an apportionment of off-reservation fish between Indians and non-Indians. *Fishing Vessel* is distinguishable because it involved a treaty provision pursuant to which the Indians expressly had agreed to share that off-reservation resource "in common with all citizens of the Territory." [42] But, even if *Fishing Vessel* were applicable, there is no inconsistency with *Arizona I*. The Court in *Fishing Vessel* cited approvingly to *Arizona I* as an example of an apportionment of natural resources between Indians and non-Indians "that assured that the Indians' reasonable livelihood needs would be met." [43] 443 U.S. at 685-86.

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dians are a controlling factor, *e.g.*, Shoshone Tribe, 304 U.S. at 116; in which ambiguities are to be resolved in the Indians' favor, *e.g.*, McClanahan v. State Tax Comm'n, 411 U.S. 164, 173 (1973); Choctaw Nation v. United States, 318 U.S. 423, 431-32 (1943), and which creates rights that cannot be abrogated without the payment of just compensation, *e.g.*, Menominee Tribe v. United States, 391 U.S. 404, 413 (1968). Public lands of the federal government are generally subject to state regulation; Indian lands are not. The purpose in reserving federal land often is narrow and requires only a limited amount of water, as was true of the national forest in *New Mexico* (whose primary purpose was to conserve water flows and thereby increase the availability of water to downstream users, 438 U.S. at 705-13) and the national monument in *Cappaert* (whose purpose was simply to protect "the natural habitat of the [fish] species sought to be preserved," 426 U.S. at 141). By contrast, "since the primary purpose for which most Indian reservations were established was to provide for an economically self-sufficient place of residence, in most cases Indians are entitled to significantly greater quantities of water than other federal land areas." F. Cohen, *Handbook of Federal Indian Law* 584 (1982 ed.) (footnotes omitted) (hereinafter "F. Cohen").

[42] 443 U.S. at 674 (quoting Art. III of the Treaty of Medicine Creek).

[43] There is no evidence in the record to suggest that the quantification based on PIA will result in the Shoshones or Northern Arapahoes' receiving more than a "reasonable livelihood" or "mod-

Again, there was no express or implied criticism of the PIA standard. In any event, it is unclear what point Wyoming is trying to make regarding *Fishing Vessel*, for Wyoming seems to disavow its significance in the context of quantifying reserved rights for the irrigation needs of Indian reservations.[44]

In short, *Cappaert*, *New Mexico* and *Fishing Vessel* are all consistent with and indeed cite approvingly to *Arizona I*. Thus, as the Wyoming courts correctly concluded, Pet. App. 47a, the PIA ruling in *Arizona I* remains good law.

2. *There Is No Merit to Wyoming's Argument that the Wyoming Courts Erred in Quantifying the Reserved Right by Failing To Consider the Competing Interests of Non-Indian Water Users.*

Wyoming claims (Br. 35-39) that the PIA standard is inconsistent with the alleged teaching of *New Mexico*

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erate" living. To the contrary, the unemployment rate among Indians on the Reservation at the time of trial was 45 percent. Pet. App. 568a-69a. (*See also infra* pp. 46-47.) Wyoming sought to prove at trial not that the water would make the Indians rich, but rather that the future irrigation projects were not economically feasible.

[44] Wyoming argues that *Fishing Vessel* permits awards of natural resources "only in those amounts necessary . . . to provide reservation Indians a 'moderate living.'" Br. 13, citing *Fishing Vessel*, 443 U.S. at 686. Wyoming notes that, on an agricultural Indian reservation, it "may well be true" that "it may be impossible to generate a moderate living for its Indian residents based solely on agriculture." Br. 16. But Wyoming then concludes that any award of Indian reserved rights beyond current water use is a "windfall" to the Indians, even if, as Wyoming seems to recognize, the irrigation by the Indians of all their practicably irrigable land might still not provide them with a moderate standard of living. *Id.* at 31-35. Accordingly, Wyoming appears to be arguing that, if the Indians cannot reach a moderate standard of living with an award of their full treaty rights, those rights should be frozen to current water uses—a new and shockingly unfair canon of Indian treaty interpretation that would ensure that the Indians lack any water resources even to attempt to improve their standard of living. That would turn *Fishing Vessel* on its head.

that quantification of a reserved water right must take into account the water needs of non-Indians. In effect, Wyoming argues that *New Mexico* requires an equitable apportionment that balances the needs of the Indians against those of others. As Wyoming admits (Br. 37 n.53), none of the five post-*New Mexico* lower-court decisions applying the PIA standard has construed *New Mexico* in this fashion. In addition, *New Mexico* repeatedly cited with approval this Court's unanimous decision in *Cappaert*, which had considered and rejected the argument that "the cases establishing the doctrine of federally reserved water rights articulate an equitable doctrine calling for a balancing of competing interests." 426 U.S. at 138. The same argument was also considered and rejected in *Arizona I*. 373 U.S. at 596-97.

The sole issue in *New Mexico* was the identification of the purposes for which water was deemed to have been reserved for a national forest. Its holding was that, in light of the demonstrated awareness and concern in Congress regarding the limited water supply in the arid West at the time the national forest was created, water was deemed to have been reserved only for the "primary" purpose or purposes of the federal reservation, with the government relegated to securing water for "secondary" purposes under state law. 438 U.S. at 698-702. Nothing in *New Mexico* suggests that, once the primary purpose of the reservation has been identified, the quantification of the water needed to fulfill that purpose should be influenced by other factors. In fact, since the *New Mexico* standard of quantification is unequivocally the requirements of the federal reservation for its primary purpose, to allow any other factor to tilt the quantification exercise would be contrary to *New Mexico* itself.

In any event, far from ignoring the competing interests of non-Indian water users—which should not even

be considered in cases involving Indian reserved rights [45] —the Wyoming Supreme Court became the first court to invoke these interests in limiting the reserved water right of Indian tribes. While necessarily conceding that "non-agricultural activities on the reservation" were contemplated, Pet. App. 40a, the court accepted the State's contention that "[t]he primary activity was clearly agricultural," *id.* at 41a, and denied reserved water for all other purposes. The court concluded that, by defining the purpose of the reservation in what the court admitted was a "narrow" fashion, it had "evidence[d] a sufficient sensitivity to the water needs of other water users." *Id.* at 72a. The court went further; it also relied on "sensitivity" considerations in reducing the tribes' entitlement by quantifying the reserved water for historic lands on the basis of a higher water-use efficiency rate than historic efficiency levels.[46] *Id.* To press "sensitivity" considerations even further—to allow them to overthrow the well-established PIA standard of quantifying water reserved for an agricultural purpose—would be to render the principle of reserved rights virtually meaningless.

3. *There Is No Merit to Wyoming's Proposed Limitation of the Tribes' Reserved Right to the Amount of Water Necessary for the Historically Irrigated Acreage for Which the Indians Have No Protective State Water Permits.*

Wyoming argues that, because there has been "ample opportunity" (Br. 22; "ample time," Br. 30) for full irrigation development on the Reservation, the water reserved for the Tribes should not exceed that necessary

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[45] The significant distinctions between reserved rights on Indian and federal reservations (*supra* note 41) warrant the conclusion that in the case of Indian reservations not merely the primary purpose but all substantial purposes of the reservation should be taken into account in defining the reserved right to water.

[46] The Tribes have sought review of this ruling in their cross-petition in No. 88-492.

to irrigate the Reservation's historically irrigated acreage. Wyoming goes further and argues that, where historically irrigated land is covered by protective state water permits, the Tribes' vested treaty rights to reserved water are superseded by the permits; only historically irrigated land *not* covered by state permits would be entitled to a reserved right.

a. *Limitation of the Treaty Right to Water Historically Used Would Abandon Eighty Years of Precedent on Which Indian Tribes Have Reasonably Relied.*

Adoption of Wyoming's proposed "use it or lose it" rule would require the abandonment of long-standing precedent on which the Tribes have justifiably relied. There is no hint in *Winters* or its progeny that a reserved water right can be lost by non-use; indeed, the fact that it cannot be so lost is universally recognized as the crucial difference between the prior-appropriation and reserved-rights methods of acquiring interests in water.[47] In *Arizona I* this Court held that the reserved right "was intended to satisfy the future as well as the present needs of the Indian Reservations."[48] 373 U.S. at 600. Prior to *Arizona I*, in *United States v. Powers*, 305

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[47] *E.g.*, United States v. District Court in and for the County of Eagle, 401 U.S. 520, 523 (1971); Nat'l Water Comm'n, Water Policies for the Future—Final Report to the President and to the Congress of the United States 473 (1973); F. Cohen at 578.

[48] Wyoming is simply wrong in asserting that the ruling below "is in stark contrast to the decisions of other courts which have dealt with Indian reservations on which there has been ample time to reach full irrigation development." Br. 30. This Court has never imposed a deadline on the use of Indian reserved water rights. The Colorado River Reservation at issue in *Arizona I* had been receiving federal appropriations for Indian irrigation development since 1910, a fact that Arizona underscored. Opening Brief for Arizona, Arizona v. California, No. 8 Original, Oct. Term 1961, pp. 144-47; but this Court agreed with the Master's recommendation to quantify an amount of water for future irrigation projects on the Colorado River Reservation that was significantly larger than the award for future projects in this case. *See* Arizona v. California, 376 U.S. 340, 344-45 (1964) (decree).

U.S. 527, 533 (1939), the Court had rejected the theory that a reserved water right can be limited by partial exploitation: "Adoption by the Secretary of plans for irrigation projects to serve certain lands was not enough to indicate a purpose to exclude all other land from participation in essential water."

Wyoming claims that the Ninth Circuit in several pre-*Arizona I* cases held that "[w]hen there had been ample opportunity for substantial completion of development on a reservation, *e.g.*, when there had been a long history of irrigation, the foreseeable needs were considered as being identical to historic use." Br. 22. While these decisions are hardly dispositive today, Wyoming's description of them is so egregiously misleading as to require some comment, for in fact they are sharply opposed to Wyoming's position and support that of the Tribes.

Wyoming relies on *Conrad Investment Co. v. United States*, 161 F. 829 (9th Cir. 1908), as limiting reserved rights to the water needed for historic uses. *Conrad* was a suit for an injunction against upstream diversions that interfered with existing tribal uses; quantification of the tribes' entire reserved right was not in question—as indeed it would not be today in a similar procedural posture. Even in that context, however, the *Conrad* court held that the tribes were entitled to "whatever water of Birch creek may be reasonably necessary, not only for present uses, but for future requirements," 161 F. at 832, and that, since "the Indians . . . have a paramount right to the waters of Birch creek, it follows that the permission given to the defendant to have the excess over the amount of water specified in the decree should be subject to modification." *Id.* at 835. The clear implication is that the reserved right extended to all the water in the stream to the extent that reservation land might be put to agricultural use in the future.

Wyoming's reliance on *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956), *cert. de-*

nied, 352 U.S. 988 (1957), is equally misplaced. Wyoming suggests that the *Ahtanum* court limited the reserved rights to the Indians' needs "'in 1915, when the Indian ditch system had been completed.'" Br. 23, *quoting* 236 F.2d at 337. What Wyoming ignores is that by 1915 the Indians' needs had extended to substantially the entire flow of the stream, 236 F.2d at 327, and that the court held that the Indians had a "paramount right" to that amount, "regardless of the quantity remaining for the use of white settlers." *Id.* The court expressly rejected the argument that "the reservation of waters for the benefit of the Indians must be limited to the amount or quantity actually used beneficially by the Indians within some period of time or within what the court might find to be a reasonable time." *Id.* The possibility of further increased needs after 1915 was wholly academic, since the entire flow of the stream was necessary to meet the Indians' established needs by that date. *Id.* at 328.[49]

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[49] Wyoming also relies on United States v. Walker River Irrigation Dist., 104 F.2d 334 (9th Cir. 1939). There the court did award water only for historically irrigated lands, but based its holding on a master's factual finding that no more was needed in view of a decline in the Indian population of more than 37 percent since 1875. By contrast, the Master in this proceeding accepted a projection that the Indian population on the Wind River Reservation would more than double between 1980 and 2020. *See infra* p. 45. Additional water was awarded in *Walker River* for domestic, stockwatering and power purposes.

Finally, Wyoming observes that the appellate decision in *Winters*, 143 F. 740 (9th Cir. 1906), protected only existing irrigation, although even Wyoming concedes that there had not been "ample opportunity" for development of the Fort Belknap Reservation by 1906. *Winters*, like *Conrad*, was an injunction case, not a general stream adjudication; thus a decree against injury to existing uses was all that was necessary or that was requested. The court held that the Indians had reserved water "'*at least* to an extent reasonably necessary to irrigate their lands.'" 143 F. at 749 (emphasis added).

In *Skeem v. United States*, 273 F. 93, 95 (9th Cir. 1921), it was likewise argued that the Indians were limited to water for historically irrigated lands. The court rejected the argument in language clearly anticipating the PIA standard:

> The purpose of the Government was to induce the Indians to relinquish their nomadic habits and to till the soil, and the treaties should be construed in the light of that purpose and such meaning should be given them *as will enable the Indians to cultivate eventually the whole of their lands so reserved to their use.* (Emphasis added).

Thus, the consistent holdings both of this Court and of the Ninth Circuit over more than eighty years have promised Indian tribes that their reserved right to water will not be lost by a present inability to use it. Wyoming proposes that the Court now abandon that promise and apply retroactively a "use it or lose it" rule. Such a course would be as unfair as it is unwarranted. This Court has stood firm against arguments that would result in the loss of Indian property rights due to their non-use. *See generally* C. Wilkinson, *American Indians, Time, and the Law* 32-52 (1987).

b. *Wyoming Has Made No Showing that the Tribes Have Had "Ample Opportunity" Fully To Develop Their Water Resources.*

Wyoming's proposed limitation of the Tribes' reserved water right to historic lands depends entirely on the premise that they have already had "ample opportunity" to develop irrigated agricultural use of their Reservation, and thus that any land not yet so developed must be land not "needed" for that purpose.

This contention is without either merit or record support.[50] While Wyoming asserts (Br. 29) that the Tribes

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[50] There are no findings of fact to support Wyoming's argument, and it is unclear that this point was properly presented to the Wyoming courts.

received "massive amounts of congressionally mandated expenditures for the construction of irrigation projects," the total amount spent by the United States, to date, is some $4.4 million. *See supra* note 9. That figure is dwarfed by the more than $70 million of federal expenditures for some 73,000 acres of non-Indian irrigation in the Riverton Reclamation Project, only one of the several non-Indian projects on the Reservation. *See supra* note 10.

As Wyoming asserts (Br. 5, 28-29), by 1915 state permits had been acquired on behalf of the Indians for 145,000 acres of Reservation lands, but there are only some 54,000 acres of historically irrigated Indian land. Wyoming is blind to the significance of these figures. What they show is that there was early federal recognition that land far in excess of the award in this case was irrigable and that the Indians would need to irrigate it; that non-Indian settlers were fully on notice of these facts, but that the federal government failed to fulfill its early intentions and concentrated on developing irrigation projects for the benefit of non-Indians, to the neglect of its trust obligations to the Indians.[51]

In this respect the Wind River Reservation is typical of a federal bias in favor of non-Indian water development that has been called "one of the sorrier chapters" in "the history of the United States Government's treatment of Indian tribes."[52] "For political and institutional rea-

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[51] Wyoming itself appears to acknowledge that the Tribes have not had an ample opportunity for full irrigation development. In its certiorari petition, Wyoming conceded that "[f]rom 1905 to 1963 . . . delays in completing project construction . . . prevented timely application of water to beneficial use upon many Indian tracts." Pet. 5. These "delays" did not cease in 1963.

[52] Nat'l Water Comm'n, Water Policies for the Future—Final Report to the President and to the Congress of the United States 475 (1973).

> With the encouragement, or at least the co-operation, of the Secretary of the Interior—the very office entrusted with pro-

sons, the United States has failed to secure, protect, and develop adequate water supplies for many Indian tribes." [53] Exploitation of a legal right to water involves massive capital investment for which even prosperous fee owners typically look to governmental resources; Indians have been in a much worse position in seeking private financing, since much of their land could not be mortgaged or pledged as collateral.[54] Yet, ironically, "Congress has tended to give a higher priority to [irrigation] projects that benefit non-Indians." [55]

Wyoming now seeks to perpetuate this past discrimination by freezing the reserved rights of Indians only to the irrigated acreage that they were able to develop with federal funding during "one of the sorrier chapters" in the history of this nation's dealings with Indian tribes. But even if the existence of "ample opportunity" could warrant a departure from the PIA standard, no such departure is warranted here. Wyoming's argument fails on its own terms: the Tribes simply have *not* had "ample opportunity" to develop their water resources.

c. *Wyoming's Argument that Protective State Permits Supersede Vested Treaty Rights Is Not Properly Before the Court and Is Devoid of Merit.*

Wyoming further argues that, even with respect to the historically irrigated acreage, no treaty rights should

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tection of all Indian rights—many large irrigation projects were constructed on streams that flowed through or bordered Indian Reservations . . . . With few exceptions the projects were planned and built by the Federal Government without any attempt to define, let alone protect, prior rights that Indian tribes might have had in the waters used for the projects.

Id. at 474-75. *See also* Federal Protection of Indian Resources: Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 92d Cong., 1st Sess., 235-49, 907-14 (1971).

[53] F. Cohen 596-97.

[54] *Id.* at 598.

[55] *Id.*

be recognized to the extent that there are protective state permits to irrigate the land.

This argument is an attempt to circumvent the Court's limited grant of certiorari,[56] but, even if properly presented, the argument is devoid of merit. Wyoming claims that a state permit eliminates the need for a treaty right. But a treaty right is a vested property right not subject to loss by non-use, whereas a state permit remains an unperfected right until the water is put to beneficial use, *see supra* note 22; and, even if perfected, is subject to loss by non-use (Br. 34). Moreover, the treaty right entails an 1868 priority, while the state permits have priority dates in the 1905-1915 period (Br. 28). The rights are thus not equivalent.

Wyoming's theory that the treaty right of the Tribes should be superseded by the protective permits for each acre for which federal officials sought such permits would be an abrogation of a valuable property right because reserved rights "vest" and become "effective" at the time an Indian reservation is created. *Arizona I*, 373 U.S. at 600. Such a result finds no support in the legislative his-

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[56] Wyoming argues here that "[w]ater rights should not be granted under the [federal reserved right] doctrine when there is no demonstrated need for reserved water in addition to that water which is available to a reservation from state water rights which were acquired pursuant to congressional direction." Br. 17.

This is the same argument that Wyoming made in its certiorari petition in support of its request for review of Question 1, namely, whether the water proviso to the 1905 Act was inconsistent with or had abrogated the reserved water right under the 1868 Treaty. Pet. 17 n.17 ("[W]hen the needs of a reservation are met by express federal reliance upon state law, deference to state law should supersede the continued existence of any previously created implied reserved water right."). The Court excluded Question 1 from the limited grant of certiorari. 109 S. Ct. 863 (1989). In an effort to circumvent this limited grant, Wyoming has simply recast its water-proviso argument—that the provision of the 1905 Act regarding state permits supersedes the reserved rights—into an argument that the permits themselves supersede those rights.

tory or contemporaneous administrative interpretation of the 1905 Act, *see supra* note 19; runs counter to the ruling over sixty years ago of the federal district court in *Parkins*, *see supra* note 18; and would contravene well-settled principles of Indian treaty rights.[57]

Equally important, relegating the Tribes to state law for their water rights would subject this valuable Indian property right, the exercise of which occurs on Reservation lands by Indians, to state jurisdiction and control. Congress has not mandated such a result here, nor has Wyoming shown that it is appropriate or necessary. Subjecting the Tribes' water rights to Wyoming state law would be contrary to seventy years of precedent, *see Hampleman* and *Parkins*, and would invite the very state jurisdiction over on-reservation Indians and their natural resources that this Court has repeatedly denied in the absence of congressional consent or unless extraordinary circumstances require that result.[58]

Finally, Wyoming claims that the 1905 Act and the existence of state permits distinguish this case from *Arizona I*. In fact, in *Arizona I*, as here, Congress had enacted a pre-*Winters* statute[59] providing for the acquisition of protective water rights under state law for the Colorado River Reservation, and permits had been acquired pursuant to that statute.[60] Arizona argued, just as Wyoming does here, that these facts were inconsistent with the recognition of reserved water rights un-

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[57] Indian treaty rights may not be abrogated by implication or by the acts of subordinate federal officials; they may be abrogated only expressly and by act of Congress, subject to the payment of just compensation. Menominee Tribe v. United States, 391 U.S. 404, 413 (1968). No such abrogation occurred here.

[58] *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 215 n.17 (1987).

[59] Act of April 21, 1904, § 25, 33 Stat. 224.

[60] California's Proposed Findings of Fact and Conclusions of Law, Arizona v. California, No. 8 Original, (April 1, 1959), at XIII-18.

der the instruments creating the reservation.[61] This Court deemed Arizona's contention so devoid of merit that it is not even mentioned in the Court's opinion.

4. *There Is No Merit to Wyoming's Argument that the Tribes Received an "Unjustified Windfall" or an Excessive Amount of Water from the Quantification Based on PIA.*

The water quantified by the Wyoming courts based on the PIA standard is neither an "unjustified windfall" nor an excessive amount of water.

Wyoming equates an "unjustified windfall" with *any* amount of reserved water in excess of current tribal use. That contention simply disputes this Court's ruling in *Arizona I* that water had been reserved for "the future as well as the present needs of the Indian Reservations." 373 U.S. at 600. It also ignores the fact that the amount of current tribal use is determined not even by present—let alone ultimate—tribal needs, but by the grossly inadequate past federal support for Indian irrigation projects. *See supra* pp. 39-40.

Wyoming seeks support for its claim that the Indians need no future water in the fact that the Tribes failed to object when the Bureau of Indian Affairs ("BIA") allowed a large block of protective state water permits to expire in 1963. This is utterly specious, as Wyoming well knows. As Wyoming previously acknowledged, the BIA ceased to seek extensions for these protective state permits "following the announcement of *Arizona v. California*." Pet. at 6. The permits were not abandoned because the *water* was no longer needed, but because the BIA, relying on this Court's decision in *Arizona I*, justifiably concluded that *protective state permits* were no longer needed.

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[61] Opening Brief for Arizona, Arizona v. California, No. 8 Original, Oct. Term 1961, pp. 142-43.

Wyoming also seeks support for its assertion in the fact that the Tribes may use some of that water for purposes other than farming. This is also specious. The fact that the Tribes may use the water now for another purpose does not mean that they do not need it or will not use it in the future for farming, if the necessary irrigation projects can be financed and constructed. Moreover, it is well settled that, once reserved rights are quantified, an Indian tribe, if it so desires, is free to use the water for other beneficial purposes.[62] This rule furthers important objectives: it promotes Indian sovereignty and self-sufficiency, and it promotes sound management of a scarce resource by permitting the Indians to put water to its most productive use. Thus, even if the Tribes were to elect in the future to devote some of the water to a purpose other than farming, that would not mean that the Tribes would have no future "need" for the water for farming, but rather that there are other possible uses that are more productive.[63]

Wyoming's further assertion that the PIA standard resulted in an excessive award is simply incorrect. From

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[62] Arizona v. California, 439 U.S. 419, 422 (1979); Memo. Sol. Int., Feb. 1, 1964, *reprinted in* II Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974, p. 1930 (n.d.).

[63] Wyoming seems to argue that, because farming may no longer be the most productive use of all water in this region, the Tribes should get no future water at all under the 1868 Treaty, but rather should apply to Congress for a new water entitlement (with a junior priority date), or for compensation. Br. 16, 49. But there is no reason why the Tribes should be stripped of all future water rights under the 1868 Treaty because, in 1989, farming on the Reservation—though economically feasible on some 54,000 untilled acres, as the courts below specifically found—may not be the most productive use of that water for the regional economy. The Tribes have a vested 1868 treaty right to this water. Wyoming's alleged concern that the water be put to its most productive use is answered, at least with respect to uses on the Reservation, by the rule that the Tribes are free to change uses of the water.

an historical perspective, the quantification based on PIA —enough water to irrigate some 108,000 acres on the Reservation—is far from excessive because, as Wyoming itself emphasizes, federal officials announced a goal and secured protective state permits to irrigate an even *larger* amount of Indian acreage before the Reservation was opened to non-Indian settlement. Moreover, the Reservation—which Wyoming argues was provided to the Tribes for the sole purpose of creating a permanent farming community—is comprised of approximately 2.5 million acres.[64] Pet. App. 533a. The rulings below thus recognize an entitlement to water sufficient for the Tribes to irrigate less than five percent of the Reservation's total acreage.[65]

Nor is the quantification excessive in view of the current and projected Indian population on the Reservation. The Indian population on the Reservation in 1980 was 4,550, and, according to projections accepted by the Master, that figure will more than double to 9,740 in 2020.[66] Thus the reserved water is now sufficient to irri-

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[64] Wyoming suggests that the amount of reserved water quantified for the Reservation is excessive because it was "greater than that for any of the *Arizona I* reservations, except for the massive Colorado River Reservation." Br. 41. What Wyoming fails to disclose is that the Wind River Reservation—the nation's third largest Indian reservation—is approximately *seven times larger* than all five Indian reservations involved in *Arizona I*. The total acreage of the *Arizona I* reservations is 335,500 acres, of which 136,636 was found to be practicably irrigable. Master's Report at 85-88. The annual diversion for these reservations was set at 905,496 acre feet annually. Arizona v. California, 376 U.S. 340, 344-45 (1964) (decree). By contrast, the Wind River Indian Reservation, which is larger than the States of Delaware and Rhode Island combined, consists of approximately 2.5 million acres, of which approximately 108,000 acres were found to be practicably irrigable, requiring an annual diversion of about 500,000 acre feet.

[65] Since non-Indians currently irrigate some 120,000 acres on the Reservation, Br. 4, the reserved right recognized by the Wyoming courts is for less acreage than that now in irrigation by non-Indians on the Reservation.

[66] Pet. App. 607a; J.A. (Wyo. Sup. Ct.), Vol. X, U.S. Exh. C-18.

gate less than 24 acres per resident tribal member, and thirty years from now that number will likely drop to 11 acres per member. These figures fall far below the size of farming allotments provided by the 1868 Treaty (up to 320 acres per family and up to 80 acres for individual adults). Pet. App. 797a.

The quantification is also not excessive within the context of this proceeding. The Wyoming courts recognized reserved rights for some 108,000 practicably irrigable acres, only some 6,000 more than was originally proposed by Wyoming. *See supra* note 12. The Wyoming courts rejected some 50,000 acres of historic and future lands claimed by the United States or the Tribes to be practicably irrigable.[67] Pet. App. 72a. The courts based their quantification of reserved rights solely on the irrigation needs of the Reservation, rejecting all claims of reserved rights based on purposes other than farming, such as mineral extraction, fisheries and municipal uses. Pet. App. 32a-43a.

Finally, contrary to Wyoming's suggestion that the quantification was excessive because the Tribes do not need additional water for future irrigation development, the Reservation is in desperate need of economic development, both agricultural and non-agricultural. A recent study funded by the State, the Tribes, and the Bureau of Indian Affairs revealed that the unemployment rate on the Reservation was 71 percent and that the incomes of 75 percent of the Indian families were below federal "low income" and "poverty" standards. WINDS Project, Executive Summary (reproduced herein at Appendix E, at 25a, 27a). The study concluded that "the Wind River Reservation represents an area that is chronically economically depressed" and "is characterized by an astoundingly high rate of unemployment, and unusually high needs for services in the areas of health, alcohol and drug

[67] The Tribes are seeking review of a number of the rulings resulting in these reductions in their Cross-Petition in No. 88-492.

abuse, education, quality of housing, economic development, sanitation, and related areas." *Id.* at 32a.

The water quantified in this proceeding is desperately needed to respond to these economic conditions. A large portion of the award—almost 60 percent [68]—is for historically irrigated acreage, and thus the economic potential of most of this water is already being tapped.

The promise of this litigation, in terms of the efforts of the Tribes to solve the serious problems on their Reservation, lies in the reserved water that was awarded for lands—some 54,000 acres—not yet in irrigation. It is precisely that water that the State is challenging here as excessive. That award—the full measure of what is available for future development—is enough to irrigate only an additional 12 acres per resident tribal member. It cannot seriously be maintained that this award to the Tribes is an excessive amount of water with which to pursue the express promise of the 1868 Treaty: for the Indians to "make said reservation[] their permanent home." Pet. App. 796a.

5. *Wyoming's Proposed Quantification Standard Is at Odds with This Court's Prior Decisions.*

Wyoming's proposed alternative to the PIA standard is based on an amalgam of legal premises previously rejected by this Court.[69] The suggested "opportunity for

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[68] *See supra* note 16.

[69] Wyoming urges (Br. 48) this Court to adopt a standard that focuses on whether an Indian reservation has had "an opportunity" (not even an ample opportunity) "to fully develop its agricultural industry," and, if not, whether "there is a quantifiable need for additional water to serve lands which can realistically be expected to be irrigated in the future." In addition, if any Indian land is subject to state water rights, the trial court must determine whether "additional Federal reserved water rights are necessary to meet the reservation's agricultural needs." *Id.* All this is to be "circumscribed" by a "sensitive application of the reserved water right doctrine," taking into account "the impact of the reserved

full irrigation" rule would result in a retroactive application of the "use it or lose it" proposal that this Court has long rejected in Indian water-rights cases. *See supra* pp. 35-38. Wyoming's proposed rule that reserved rights exist only if Indian lands are not covered by state water rights flies in the face of the well-settled proposition that Indian reserved rights "vest" and become "effective" at the time an Indian reservation is created, and the long-standing principle that Indian treaty rights are not abrogated by implication. *See supra* pp. 40-43. Finally, the suggestion that the quantification of Indian reserved rights be "circumscribed" by a consideration of the impact on non-Indians has been repeatedly rejected by this Court since *Winters*. *See supra* pp. 32-34. In short, the proposed standard is simply a wish list that ignores the last eighty years of decisions regarding Indian reserved water rights.[70] It should therefore be rejected.

III. Any Modification of the PIA Standard Should Be Prospective Only.

In the event that this Court modifies the PIA standard, the modified standard should not be applied in this case. *See England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 422 (1964) ("On the record in

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water right on non-Indians using water under state law." *Id.* at 15-16.

[70] The proposed standards of many of the various state amici also include factors that are based on legal premises long rejected by this Court. Moreover, most of the proposed standards of the state amici fail to provide any guidelines to trial courts, *e.g.*, Brief of Amici Salt River District at 18 ("Solomonic balancing of a myriad of factors"), and thus appear to be nothing more than an attempt on the part of the states to leave the quantification of Indian water rights to the discretion of state trial judges. If this approach were taken, this court would be unable to subject these state court decisions to the "particularized and exacting scrutiny" promised by this

the instant case, the rule we announce today would call for affirmance of the District Court's judgment. But we are unwilling to apply the rule against these appellants."); *cf. Chevron Oil v. Huson*, 404 U.S. 97, 106-07 (1971).

Basic fairness requires that result. In reliance on this Court's holding in *Arizona I* that PIA is the "only feasible and fair" way to measure the water reserved for irrigated farming, and on Wyoming's own request that the PIA standard be adopted, the Tribes have expended their scarce financial resources for a decade of litigation on the basis of that standard, and the Wyoming courts properly applied *Arizona I* here. The Tribes have finally achieved a quantification of their reserved water right that, while far less than what they sought, will permit them to proceed to a modest extent with desperately needed economic development that has been impossible throughout this protracted litigation while the quantum of their reserved right was uncertain. If this Court should now modify the PIA standard and make its new holding applicable to this case, the Tribes would be relegated to further years of uncertainty, legal expense and deprivation of development. The case for prospective-only application of a modified standard could hardly be more compelling.

Court when it determined that such cases are to be tried in state court. Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 571 (1983).

CONCLUSION

For the foregoing reasons, the holding of the Supreme Court of Wyoming that the PIA standard is the appropriate measure of the reserved right under the 1868 Treaty for the irrigation needs of the Tribes should be affirmed.

Respectfully submitted,

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April 12, 1989

APPENDICES

APPENDICES

APPENDIX A

IN THE DISTRICT COURT OF THE
FIFTH JUDICIAL DISTRICT
STATE OF WYOMING

Civil No. 4993

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE BIG HORN RIVER SYSTEM AND ALL OTHER SOURCES, STATE OF WYOMING

STATE OF WYOMING'S RESPONSE TO THE UNITED STATES' STATEMENT OF CLAIMS AND TO THE STATEMENT OF THE SHOSHONE AND ARAPAHOE TRIBES CONCERNING THE MEASUREMENT OF TRIBAL RESERVED WATER RIGHTS

COMES NOW, the State of Wyoming (hereinafter "Wyoming"), by and through the Attorney General, and sets forth its response to the Statement of Claims filed by the United States on March 5, 1980, the United States Supplemental Claim, and to the Statement of the Shoshone and Arapahoe Tribes Concerning the Measurement of Tribal Reserved Water rights filed on April 6, 1980. Wyoming's brief in support of this Response is appended hereto and incorporated by reference as if fully set forth herein.

I. *General Position of Wyoming*

Except as admitted below, Wyoming denies, pursuant to W.R.C.P. 8(b), that the United States and the Shoshone and Arapahoe Tribes (hereinafter "Tribes") are entitled, as a matter of fact and law, to the water rights which they claim.

II. *General Denial of Reserved Rights in Wyoming*

* * * *

III. *Limitation of the Reserved Water Right Generally*

With respect to any reserved right which the Court may determine to exist on behalf of the United States or Tribes in this litigation and incorporating all the foregoing by reference:

1. Wyoming affirmatively asserts that no reserved water right exists unless the United States intended specifically to create said right on behalf of a specific individual reservation of land in Water Division No. 3.

2. Wyoming affirmatively asserts that the United States intended to create those reserved water rights claimed by it or the Tribes only if the primary purposes of the reservation for which the right is claimed would be entirely defeated without the use of water for those purposes.

3. Wyoming affirmatively asserts that any reserved water right awarded by the Court for any individual reservation must be precisely quantified in terms of each specific reservation purpose(s) which the right is claimed as necessary to fulfill.

4. Wyoming affirmatively asserts that, with respect to each reservation herein, the United States intended to reserve only the minimal amount of water necessary to prevent the primary purposes of the reservation from being entirely defeated.

5. Wyoming affirmatively asserts that the United States intended to reserve water, if any, only to fulfill the primary purposes of any reservation claimed herein, and not to fulfill secondary purposes of said reservations.

6. Wyoming affirmatively asserts that, in determining the amount of any reserved water right

awarded herein, the Court must consider the scope of the injury which will be caused by said right to competing appropriative water rights which have been awarded by Wyoming and must limit said reserved right to minimize injury to owners and users of appropriative rights.

* * * *

IV. *Wind River Indian Reservation*

With respect to the claims for the use of water associated with the Wind River Indian Reservation, pages 1 through 16 of the United States' Statement of Claims and pages 1-9 of the Statement of the Shoshone and Arapahoe Tribes concerning the Measurement of Tribal Reserved Rights, and incorporating all of the foregoing by reference.

1. Wyoming denies that any reserved rights exist on behalf of the Wind River Indian Reservation for those reasons stated at Sec. II, above.

* * * *

9. Even if the Court determines that the United States did create a reserved water right when it created the Wind River Indian Reservation, Wyoming affirmatively asserts that no reserved right on behalf of said reservation exists except as created by the United States in trust for and on behalf of the Indians on the Reservation.

* * * *

11. Even if the Court determines that the United States did create a reserved water right when it created the Wind River Indian Reservation, Wyoming affirmatively asserts that said right may be exercised only to provide the minimal amount of water necessary to prevent the purposes of the Reservation from being entirely defeated.

12. Wyoming affirmatively asserts that the purpose of the Wind River Indian Reservation was and is to convert the Indians from a nomadic to an agricultural people.

13. Wyoming denies that it is the purpose of the Wind River Indian Reservation to provide a permanent home for the Shoshone and Arapahoe tribes, except as that statement of the Reservation's purpose intends to reflect that the Reservation was created to convert said tribes from a nomadic to an agricultural people.

14. Pursuant to said purpose, Wyoming admits that, if a reserved water was created on behalf of the Wind River Indian Reservation, it was created solely to provide the Indians living thereon with a supply of water for domestic uses, for the irrigation of all practicably irrigable land on said Reservation, and for stockwatering uses.

15. Wyoming denies that the United States is entitled to the amounts of water claimed for irrigation, domestic, and stockwatering uses at pages 1-4 of its Statement of Claims and denies the United States' claim of practicably irrigable acres on the Wind River Indian Reservation.

16. Wyoming denies that the Tribes are entitled to the amounts of water claimed for irrigation uses at pages 1-7 of their Statement of the Shoshone and Arapahoe Tribes concerning the Measurement of Tribal Reserved Water Rights and denies the Tribes' claims of practicably irrigable acres on the Wind River Indian Reservation.

17. Wyoming affirmatively asserts that the measure of any reserved water right which may be determined by the Court to exist for the benefit of the Wind River Indian Reservation is strictly defined and limited in its quantity by the pur-

pose of the Wind River Indian Reservation as stated in paragraph no. 12. As is more fully described in Appendices A, B, and C hereto, and on the basis of information currently available to Wyoming, said purpose authorizes the use of the following quantities of water as a maximum amount for the uses specified by paragraph no. 14, above:

Irrigation (Appendix A) 323,176 acre-feet per annum

Livestock (Appendix B) 414 acre feet per annum

Domestic (Appendix C) 1604 acre-feet per annum

18. Wyoming denies that the United States intended to reserve or did reserve any water to serve any purpose of the Wind River Indian Reservation or any water use thereon except those specified by paragraphs no. 12 and no. 13, above.

* * * *

26. Wyoming affirmatively asserts that the quantities of water described above are maximum quantities to which the United States may possibly be entitled under its reserved water right on behalf of the Wind River Indian Reservation, if any, based upon information currently available to Wyoming.

27. Wyoming affirmatively asserts that the quantities of water described above may be increased or reduced and quantities may be assigned to additional reserved water rights claimed by the United States as additional information becomes available. Wyoming reserves the right to amend its response as may be necessary to include such

information in the response as that information becomes available.

* * * *

29. Wyoming denies that the United States may be awarded a reserved water right for irrigation uses, if any, in this litigation for lands for which studies of irrigation feasibility are not completed and for which irrigation feasibility has not been proved prior to the termination of the taking of evidence in this matter.

30. Wyoming denies that any reserved water right may be granted to account for the speculative future development of allegedly cultivable lands existing on the Wind River Indian Reservation as claimed at pages 5-6 of the Statement of the Shoshone and Arapahoe Tribes Concerning the Measurement of Tribal Reserved Water Rights.

* * * *

44. Wyoming admits that the priority date for any reserved water right found by the Court to exist for those portions of the Wind River Indian Reservation held in trust by the United States for the Indians which were never disestablished is July 3, 1868.

* * * *

APPENDIX A

Basin	Practicably Irrigable Acres	Amount (Acre-Feet/Annum)
	* * * *	
Total Irrigation		
Historic	34726	121561
Future	67205	201615
Total	101931	323176

[Dated: July 16, 1980]

APPENDIX B

[STATE SEAL]

STATE OF WYOMING
OFFICE OF THE GOVERNOR
Cheyenne 82002

MIKE SULLIVAN
Governor

FOR IMMEDIATE RELEASE
FRIDAY, FEB. 17, 1988 [*sic*; 1989]
Contact: Dennis Curran, 777-7434

SULLIVAN, TRIBES SIGN INTERIM AGREEMENT

Gov. Mike Sullivan and officials of the Joint Business Council of the Shoshone and Arapaho Tribes on Friday signed a one-year interim agreement regarding water and tax issues on the Wind River Indian Reservation.

The interim agreement still must be approved by the Wyoming Legislature and the United States Government.

The agreement was signed in Cheyenne by Sullivan; John Washakie, chairman of the Shoshone Business Council; and Burton Hutchinson, chairman of the Northern Arapaho Business Council.

If approved by the Legislature and federal government, it will take effect on April 1 and will resolve for the next year the two principle disputes between the tribes and the state.

"This interim agreement we sign today is merely a first step in a complex process, but it is a historic first step," Sullivan said. "It signifies the strong desire of both the state and the tribes to resolve our disputes over water and taxes amicably and fairly for all parties."

Under the terms of the interim agreement, the tribes will receive from the state:

(1) $2 million in cash for use in compensating Indian irrigators for possible drought-related crop losses this summer and for such other purposes as the Joint Business Council may decide.

(2) A reduction of 4½ percent of the state's 6 percent severance tax on oil and gas production on the Wind River Reservation. This reduction will permit the Tribes to raise approximately $2 million in additional tribal tax revenues during 1989 without increasing total tax burden on reservation oil and gas producers.

(3) $1.3 million in grants for rehabilitation and expansion of existing water delivery systems on the reservation and for a study of potential water storage sites on the reservation.

In return, the tribes agreed to share water equally among all irrigators in the six federal irrigation projects on the reservation (Crowheart, Ray, Coolidge, Johnstown, Sub Agency and Left Hand units), based on total irrigated acreage for each particular tract.

Outside of the six federal irrigation projects, water is to be allocated in accordance with historical priority dates attached to the lands.

The tribes also agree not to seek to enjoin or otherwise hinder the collection of any remaining state or county taxes on oil and gas production on the reservation, including the county's ad valorem tax on oil and gas production.

Sullivan and the tribal leaders said an important objective of the interim agreement is to facilitate the negotiation of a long-term settlement of the tax and water issues on the reservation.

The tribes and the state will seek to reach such agreement during the coming year.

The interim agreement will not affect the litigation of the water rights case in the United States Supreme Court, now set for argument in April. Nor will the agreement have any effect after it expires in a year.

However, Sullivan and the tribal leaders said the agreement is a precedent-setting example of tribal-state cooperation on water and tax matters and may serve as a model for other tribes and states.

Sullivan joined the tribes in thanking all those involved in the negotiations as well as the Fremont County legislators and the citizens of Fremont County who have lent their support.

APPENDIX C

TRIBAL-STATE INTERIM SETTLEMENT AGREEMENT ON TAX AND WATER ISSUES

During the term of this Agreement, the Shoshone and Northern Arapaho Tribes (the "Tribes") of the Wind River Indian Reservation (the "Reservation") and the State of Wyoming (the "State") agree as follows:

1. Water on the Reservation is to be allocated (a) within the six (6) federal irrigation projects (Crowheart Unit, Ray Unit, Coolidge Unit, Johnstown Unit, Sub Agency Unit, Left Hand Unit) in accordance with the principle of equally shared surpluses and shortages, if any, in a manner that reflects traditional rotation practices for each such project, and (b) outside of the above projects in accordance with historical priority dates attached to the lands outside of such projects. In applying the principle of equally shared surpluses and shortages, if any, water shall be allocated to individual tracts of land based on the total amount of irrigated acreage in each tract, rather than the size or number of headgates for the particular tract.

2. The Tribes and the State, in coordination with the Bureau of Indian Affairs, shall cooperate in jointly monitoring and managing water allocations on the Reservation.

3. The State shall reduce its severance tax on oil and gas production on the Reservation from six percent to one and one-half percent.

4. The Tribes may amend the rate of their severance tax on oil and gas production on the Reservation. The tribal tax rate is now equal to four percent plus the current state and county rates of taxation. The amended tribal rate shall not exceed eight and one-half percent plus the then-current state and county rates of taxation.

5. The Tribes shall not seek to enjoin or otherwise hinder the collection of any remaining state or county taxes on oil and gas production on the Reservation, but the Tribes are free to participate as amici curiae in cases not involving the Reservation and as amici curiae in any refund proceedings involving taxpayers on the Reservation. The Tribes shall retain the current credit in the tribal tax on oil and gas production for state and county taxes paid by Reservation taxpayers.

6. The State shall provide $1,000,000 in grant funds for rehabilitation and expansion of existing water delivery systems within the Reservation. In consultation with the State Engineer, the Tribes shall define, develop budgets for, and prioritize the projects to be supported by these grant funds. As each such project is initiated, the State shall disburse funds to the Tribes up to the above total amount in accordance with the budgets and priorities for the defined projects; provided, however, that the State's obligation to the Tribes under this Agreement as to any unspent funds shall terminate on March 31, 1994. The Tribes shall return to the State any funds not spent in accordance with the above budgets and priorities.

7. The Tribes, in consultation with the Bureau of Indian Affairs, shall establish a fund and procedures for compensating Indian water users for possible losses arising from the accommodations provided by the Tribes in Paragraph 1. The State shall provide $2,000,000 in cash to the Tribes for use in this compensation fund, and any amount not allocated to the fund may be expended for such other purposes as the Tribes may decide. The payment from the State shall be due within thirty days of the effective date of this paragraph of the Agreement.

8. The State shall provide $300,000 to be used to fund a reconnaissance study of potential water storage sites on the Reservation and a study of improvements needed for the rehabilitation and expansion of existing water

delivery systems on the Reservation. These studies shall be conducted for the Tribes and the State by a consulting firm or other entity, and according to terms, mutually agreed upon by the Tribes and the State. If feasible, such studies shall be completed no later than October 1, 1989. If the Tribes are able to arrange alternative funding in whole or in part for these studies, or if the cost of these studies is less than $300,000, the remaining amount committed by the State for these studies shall be added to the funds available under paragraph 6 of this Agreement for use in rehabilitating and expanding the existing water delivery systems on the Reservation.

9. The Tribes and the State shall negotiate in good faith to reach a long-term settlement of the tax and water issues on the Reservation.

10. If the Tribes and the State are able to reach a long-term agreement regarding the tax and water issues on the Reservation, the Governor shall support legislation needed to implement the terms of such agreement, including significant funding for rehabilitation of water delivery systems and pre-construction engineering studies for water storage sites. The Tribes and the State agree to cooperate in seeking federal funding to offset these costs.

11. The Tribes and the State shall create a committee by each appointing one representative to discuss disagreements and issues arising out of this Agreement.

12. The effective dates of the terms of this Agreement are contingent upon obtaining the necessary approval of the Department of Justice and upon the enactment of implementing legislation by the State Legislature as follows: If the State Legislature has enacted implementing legislation by April 1, 1989, and the Department of Justice has not disapproved the Agreement as of that date, Paragraphs 1, 2, 3, 4, and 5 of this Agreement shall take effect on April 1, 1989, but shall cease to become

effective if the approval of the Department of Justice is not obtained by May 1, 1989, unless this date is extended by written agreement of the State and the Tribes. The remaining paragraphs of this Agreement shall take effect when the State Legislature has enacted implementing legislation and the approval of the Department of Justice has been obtained; provided, however, that if such legislation is not enacted or such approval is not obtained before May 1, 1989, this entire Agreement shall become null and void, unless extended by written agreement of the Tribes and the State.

13. The various terms of this Agreement shall remain in effect for one year from the effective date of each such term as set forth in paragraph 12, except (a) as provided in Paragraph 6 for the disbursement of unspent water delivery system funds, and (b) as provided in Paragraph 10 for the Governor to support certain legislation if the Tribes and the State reach a long-term agreement on tax and water issues; provided, however, that if there has been a material breach of the Agreement that is not resolved or reconciled by the committee described above in Paragraph 11, this Agreement may be terminated by the non-breaching party sooner than one year from the effective date or dates.

/s/ John R. Washakie — Feb. 17, 1989
JOHN WASHAKIE, Chairman — Date
Shoshone Business Council

/s/ Burton Hutchinson — Feb. 17, 1989
BURTON HUTCHINSON, Chairman — Date
Northern Arapaho Business Council

/s/ Mike Sullivan — Feb. 17, 1989
MIKE SULLIVAN, Governor — Date
State of Wyoming

APPENDIX D

IN THE DISTRICT COURT OF THE
FIFTH JUDICIAL DISTRICT
STATE OF WYOMING

Civil No. 4993

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE BIG HORN RIVER SYSTEM AND ALL OTHER SOURCES, STATE OF WYOMING

WYOMING'S BRIEF IN SUPPORT OF ITS RESPONSE TO THE CLAIMS FOR WATER RIGHTS OF THE UNITED STATES AND THE SHOSHONE AND ARAPAHOE TRIBES

This brief is submitted in support of the State of Wyoming's Response to the claims for water rights of the United States and the Shoshone and Arapahoe Tribes. Wyoming's Response is incorporated herein by this reference as if fully set forth.

* * * *

C. ANY RESERVED WATER RIGHT FOR WHICH MAY EXIST ON BEHALF OF THE WIND RIVER INDIAN RESERVATION IS LIMITED IN QUANTITY TO THAT AMOUNT NECESSARY TO FULFLL THE AGRARIAN PURPOSE FOR WHICH THE RESERVATION WAS CREATED

1. *The Single Primary Purpose of the Wind River Indian Reservation Was and Is to Create An Agrarian Indian Society*

The United States and the Shoshone and Arapahoe Tribes claim that Congress, when it authorized the creation of the Wind River Indian Reservation, intended to

reserve for the use of the Tribes enough water to fulfill all present and future water needs for agriculture, stock-watering, fisheries and wildlife on and off the reservation, mineral development, municipal, industrial and commercial development, aesthetics, and any other development that is part of the advancing arts of civilization. Legal Parameters for United States' Statement of Claims at 6-7; Tribal Pretrial Brief at 8-9. Wyoming, however, contends that Congress intended to reserve only enough water, if any, to meet the agrarian needs of the reservation Indians. Any additional water needs are to be acquired according to state law in the same manner as is required for all other citizens of the state. An examination of the limited purposes and rationale for which Congress authorized the creation of the Wind River Reservation, as well as other Indian Reservations in the western United States, leaves little doubt that the expansive claims of the United States and the Tribes are completely lacking in support.

In the mid-and later 1800s many Indian Reservations were established in the western United States. The Federal government had a dual purpose in creating these reservations. First, it wanted to open up the West to non-Indian miners, ranchers, farmers, and other settlers. While avoiding the constant conflict between resident Indians and incoming settlers. Second, the government wanted to provide a homeland for the Indians so they could change from their nomadic ways and "become a pastoral and civilized people." *Winters v. United States*, *supra* at 576. It was in answer to these desires in the four state area of Colorado, Utah, Wyoming and Idaho that the United States entered into a treaty with the Shoshone Indians resulting in the creation of the Wind River Indian Reservation. The Treaty was signed by the parties at Fort Bridger on July 3, 1868 and ratified by Congress on February 26, 1869. 15 Stat. 673.

It is clear from a careful reading of the Fort Bridger Treaty, other similar treaties, and judicial decisions interpreting these treaties that the purpose for establishing the Wind River Indian Reservation was to create a permanent, pastoral community for the Indians.

* * * *

It must not be inferred, however, from the limited holdings regarding purposes which these latter cases state, that the Courts rendering them have not given detailed consideration to all possible additional reservation purposes. The opposite is true. In *Arizona v. California*, *supra*, in granting a reserved right measured by irrigation uses only, the Court noted "water from the (Colorado) river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised." 373 U.S. at 599. Despite its observation, the Court's analysis of the treaty lead to the conclusion that the reserved water right was limited to irrigation needs. 373 U.S. at 600-01. The Master and the court realized that water was necessary for the animals hunted by the Indians but the Court's decision determined the Treaty indicated no intent by Congress to reserve water for wildlife purposes. * * * A review of all the cases discussed demonstrates that courts will uniformly limit any implied reserved water right on Indian Reservations to agricultural needs unless the Treaty or Executive Order creating the reservation specifically names additional primary purposes for establishing the reservation and unless such purposes would be entirely defeated without an additional reservation of water.

A reading of the Treaty of July 3, 1868, establishing the Wind River Indian Reservation was a product of the same era which produced the treaties analyzed by the foregoing cases. Its terms reveal that it was entirely consistent with the prevailing policies of the United States in that era in purposely creating a reservation

designed to convert the Indians on it to an agricultural people.

* * * *

The expansive reserved water right claims made by and on behalf of the Tribes are completely lacking in support. Reference to the language of the 1868 Treaty, case law interpreting the treaty, judicial decisions interpreting other similar treaties, as well as logic and reality support Wyoming's contention that the reserved water right, if any, for the Wind River Reservation is limited to the minimal amount necessary to fulfill the irrigation and related domestic and stockwatering needs of the Indians residing thereon. In making this contention Wyoming is not attempting to deprive the Indians of the right to develop minerals, build cities, start industries or participate in any other aspect of modern American society. Wyoming, however, recognizes that any water reserved under the 1868 Treaty is limited to the purposes for which the reservation was created, i.e., agriculture. Any additional water needs must be met by the acquisition of water rights in accordance with state water law. Wyoming is thus not preventing the Indians from developing their lands, but is simply requesting the court to recognize that all water needs of the Indians beyond those impliedly reserved must be acquired in the same manner as is required of all other citizens of the state. Wyoming does not feel this to be an unfair or unduly burdensome request.

* * * *

D. THE QUANTITY OF WATER RESERVED FOR THE WIND RIVER INDIAN RESERVATION, IF ANY, IS THAT AMOUNT OF WATER SUFFICIENT TO IRRIGATE ALL THE PRACTICABLY IRRIGABLE ACREAGE ON THE RESERVATION AND FOR RELATED DOMESTIC AND STOCKWATERING USES

The United States and the Tribes have made expansive reserved water claims for the Wind River Reservation.

The amount of water reserved, if any, is limited to that amount necessary to fulfill the purposes for which the reservation was created. It is clear from the discussion in Part C, above, that the purpose for creating the Wind River Reservation was strictly limited to agriculture. Therefore, any quantification of a reserved water right must be limited to agricultural needs. In *Arizona v. California*, *supra*, the court adopted the decision of the Master in measuring the extent of Indian reserved water rights. The Master concluded that the fair and equitable measure of the Indian reserved right is that amount of water needed to irrigate all the practicably irrigable acreage on the reservation. *Id.* at 600-01. Later decisions have followed this method of quantifying Indian reserved rights. *See*, *Colville Confederated Tribes v. Walton*, *supra*, at 326; *United States v. Anderson*, *supra*, at 15. Wyoming contends that if any reserved water exists for the Wind River Reservation, the quantity of reserved water is to be measured by the amount of water necessary to irrigate the practicably irrigable acreage presently in Tribal hands and to meet related domestic and stockwatering needs. Practicability of irrigation must be determined by reference to the date of the reservation since only in this manner can the intent of the federal government to reserve water be properly measured. Even if practicability may be measured by reference to modern technology lands for which studies of irrigation feasibility are not completed and for which irrigation feasibility has not been proven prior to the termination of the taking of evidence in this matter, cannot be considered in determining the quantity of any reserved right. The quantification is based on practicability, not possibility. Practicability signifies that a feasibility study has been done. Possibility only signifies that if a feasibility study were done it might indicate that the land is practicably irrigable. Without feasibility studies it would simply be impossible for a court to carefully and properly quantify a reserved water right. In addition, if modern technology

may be considered in determining practicably irrigable acreage it must also be considered as a limitation of the reserved water right because of the increased efficiency of modern irrigation techniques.

The United States and the Tribes apparently concede that the proper measure of any reserved water rights for irrigation needs is practicably irrigable acreage. United States' Statement of Claims at 1-3; Tribes' Pretrial Brief at 14. The Tribes, however, try to obfuscate the proper meaning and purpose of this term by making two superfluous arguments. First, they contend that in calculating practicably irrigable acreage the Master must look at all lands within the exterior boundaries of the reservation presently and potentially held in trust for the Tribes, including lands presently owned by non-Indians which may be reacquired by the Tribes in the future. Tribes' Pretrial Brief at 20. This argument defies reason and law. A reserved water right for irrigation must be based on actual reservation of land not on possible future additions to a reservation. Once reservation acreage leaves Tribal hands it cannot be considered in determining the quantity of reserved water. To hold otherwise would be contrary to all prior reserved rights cases *Winters v. United States, supra; Arizona v. California, supra; United States v. New Mexico, supra; Cappaert v. United States, supra*; and would further interfere with the State's duty to manage water use within the State. Second, the Tribes seek an open-ended quantification whereby the amount of reserved water could be periodically adjusted upward as the Tribes expand their use of water into areas heretofore unknown or unprofitable. Tribes' Pretrial Brief at 14-16. They rely on *Arizona v. California, supra*, and *United States v. Anderson, supra*, in support of this proposition. Such reliance is entirely misplaced. In *Anderson* the court stated, "(t)he quantification of the Tribes' reserved rights is based upon the amount necessary to irrigate all the practicably irrigable acreage on the reservation and as such is designed to

meet the future as well as the present needs of the tribe." *Id.* at 15. The court did retain jurisdiction, as was done in *Arizona v. California*, but declared that such retention was only for the purpose of allowing "for a modification of the judgment on showing of a substantial change in circumstances, unanticipated in the Court's quantification herein, resulting in a need for water greater than the amount reserved for future needs." *Anderson*, *supra* at 15. In the adjudication leading to *Arizona v. California*, *supra*, the Master refused to adopt an open-ended decree because he felt that would place all junior water rights in jeopardy of the uncertain and the unknowable. Master's Report at 230-31, (May 5, 1960). He instead quantified the Indians reserved right based on practicably irrigable acreage and intended this to be the extent of the reserved right. *Id.* at 232. The Supreme Court approved of this reasoning and the quantification of reserved water but still retained jurisdiction. *Arizona v. California*, *supra*, 373 U.S. at 601. The Tribes, in support of their position, place great weight on the courts' decision to retain jurisdiction. Tribes' Pretrial Brief at 16. A careful reading of the 1964 and 1979 Decrees issues by the Court, however, demonstrates that the Tribes entirely misread the Courts' purpose in taking this action. The Supreme Court, in fact, intended that the quantification based on practicably irrigable acreage be the extent of the reserved right. *Arizona v. California*, *supra*, at 600. The failure to issue a final decree was only to allow settlement of Indian reservation boundaries, not to allow increases in reserved water based on expansion of uses. *Arizona v. California*, 376 U.S. 340 (1964); *Arizona v. California*, 439 U.S. 419, 421 (1979).

The quantity of reserved water, if any, available to the Tribes residing on the Wind River Indian Reservation must be measured in terms of the amount of water necessary to irrigate all the practicably irrigable acreage presently held by the United States in trust for the

Tribes as well as the amounts needed for related domestic and stockwatering uses. That is the sum of the reserved water right, if any, on the Wind River Reservation and must govern in this case.

• • • •

CONCLUSION

In conclusion, Wyoming affirmatively asserts that there are no reserved water rights for the Wind River Indian Reservation. Even if the Court decides there are such rights they must be limited to water sufficient to meet Indian agricultural needs. The right must be quantified on the basis of practicably irrigable acreage, and the priority dates vary depending on the circumstances.

[Dated: July 16, 1980]

APPENDIX E

"W.I.N.D.S." PROJECT

WIND RIVER INDIAN NEEDS DETERMINATION SURVEY

(Pictures of Chief Washakie and Chief Black Coal Omitted in Printing)

EXECUTIVE SUMMARY

OF

FINAL REPORT, VOL. 1

AUGUST, 1988

"WINDS" Project

(Wind River Indian Needs Determination Survey)

EXECUTIVE SUMMARY OF FINAL REPORT, Vol. 1

Goals

The goals were to assess human resources services on the Wind River Reservation, to determine the true level of services, and to make recommendations, if necessary, to improve the level and quality of services.

Components

(1) "General Population" survey consisting of personal, face-to-face interviews with heads of households.

(2) "Key Person/Agency" surveys consisting of interviews with key personnel of public and private agencies both on and off the Reservation. (Results of this component will be released as "WINDS" Final Report, Vol 2).

Methodology

Households were identified using the County Rural Addressing System. This is the same system that will be used for the 1990 census.

Thirty people were selected and trained as interviewers. These comprised fifteen Arapahoe and fifteen Shoshone.

The instrument used was field tested for three days before implementation.

Random verifications of interviews were conducted periodically.

Stringent measures were taken to ensure confidentiality and anonymity.

Authority

Authority was delegated by the Joint Business Council through a resolution establishing the "WINDS" Needs Assessment Task Force.

Funding

Funding for the project was provided by the State Department of Health and Social Services, Division of Community Programs; Arapahoe Business Council; Shoshone Business Council; and the Bureau of Indian Affairs.

Survey Response

A total of 1,599 personal contacts were made, resulting in 1,532 completed questionnaires, a truly phenomenal response of 96%. During the project planning phase it was hoped that a response of 50% would be achieved. However, it was anticipated that a rate of 35-40% would probably be more realistic. The ultimate response rate of 96% is almost unheard of in most any voluntary survey. Quite obviously, we were extremely pleased with this response. Theories as to why we were so fortunate as to have such an incredible response are outlined in the full report, which accompanies this Executive Summary.

The average age of respondents was 41, of which 81% were heads of their families. Male respondents represented 49.8% and females 50.2%. Descent of respondents was as follows: Arapahoe, 46.6%; Shoshone, 31.1%; Other Indian tribes, 8.6%; non-Indians, 13.7%.

Categorization of Data

Survey results were presented as Reservation-wide, or aggregate information. They were also compiled and analyzed by Reservation area; Arapahoe, Burris, Crowheart, Ethete, Fort Washakie, and Riverton: and by

descent; Arapahoe, Shoshone, other Indian (not Arapahoe or Shoshone), and non-Indian.

(Picture Omitted in Printing)

Demographic/Income Information (Sections 1, 2 and 3)

Of the six Reservation areas, 90% of the population live in the three areas of Arapahoe, Ethete and Fort Washakie. Males comprise 48.6% and familes 51.4%.

Population by descent is: Arapahoe, 45.0%; Shoshone, 26.0%; other Indian tribe, 12.0%; and Non-Indian, 12.1%; plus 4.9% whose descent was undetermined by the survey. The percentage of Arapahoe to Shoshone is: Arapahoe, 63.4% and Shoshone, 36.6%.

Multi-family households constituted 35% of the total households.

Families with *no* income during the past year constituted 46% of the total families. Of the total families, 73% had incomes ranging from $0-$10,000 and 90% were in the income range of $0-$20,000. The average family annual income was $6,277.

Average family income by Reservation area was Arapahoe, $5,856; Burris, $5,191; Crowheart, $8,751; Ethete, $6,968; Fort Washakie, $6,144; Riverton, $2,843.

Average family income by descent was: Arapahoe, $4,972; Shoshone, $5,778; Other Indian tribe, $6,357; Non-Indian, $12,556.

Of all families, 75% were classified as "low-income" or "poverty" families, based upon the federal OMB (Office of Management and Budget) guidelines. The percent of low-income families with *no* income was 61%. The percent of low-income families not receiving per capita payments was 16%. The percent of low-income families with no income and not receiving per capita payments was 10%.

The three areas of Araphoe, Ethete, and Fort Washakie comprised 90% of the low-income families.

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Basic Needs (Section 4)

Some of the more serious problems as seen by respondents were: 82% had problems during the past year with basic transportation services, i.e., getting to the health clinic, to the tribal offices, shopping, etc. Sixty-four percent (64%) had problems with road maintenance during the past year. Some of the other problems relating to basic needs were: 38% had problems getting food; 42% with getting adequate clothing; 34% with getting adequate medical care; 49% had trouble paying utility bills; 34% had problems with their home solid waste system; 39% had problems with receiving Reservation law enforcement services; and 24% had problems regarding their personal housing situation. Conversely, only 11% said that preschool day care was a problem for them, and only 10% said that after school day care was a problem.

Seventy-nine percent (79%) thought that there was a strong need for short-term care for abandoned, neglected, or abused youths or children, and 79% thought that there was a strong need for long-term residential care for youths and children.

Of those interviewed, 94% did not have any garbage pickup. Of those not having garbage pickup, 77% hauled their garbage around five miles, and 6% hauled it over twenty miles. The average hauling distance was five miles. This issue, obviously relates to health hazards. Small land-fills and informal dumping areas, even when used with appropriate controls, can lead to more serious health hazards. For example, both domestic and wild small animals frequently feed from the animal carcasses and general refuse. Consequently, the refuse becomes scattered around the Reservation. Further, the infamous

Wyoming wind tends to blow refuse over the surrounding area.

(Picture Omitted in Printing)

Employment (Section 5)

The overall Reservation unemployment rate was 71%. It should be noted that this survey was conducted during the prime employment months and, obviously, the rate would be much higher in other months.

The unemployment rate for each descent was: Arapahoe, 70%; Shoshone, 71%; other Indian tribe, 78%; and non-Indian, 52%.

Indian people employed by Wyoming State Government as of November 30, 1987, constituted thirty-seven full time positions, and four part-time positions. Only about three of these positions are "professional"—the majority being in the area of laundry workers, food services, janitorial, maintenance and homemaker. Of the thirty-seven full time jobs, twenty-five were at the Wyoming State Training School in Lander. There were only six other Indian people employed in the towns of Lander and Riverton, both close to the Reservation.

The average hourly wage for those currently working was $6.96. The average hourly wage for all Fremont County workers was $8.66. Fourteen percent (14%) of those working were classified as "underemployed", or earning less than the minimum wage. The average length of time on their current job was 6.5 years.

For those persons that were unemployed, their average hourly wage on their last job was $5.15 per hour, and 15% had been earning less than the minimum wage. The average length of their last job was 3 years. The average length of unemployment since their last job was 4.1 years. Of those that were unemployed, 75% were employed in Fremont County on their last job.

Of those interviewed, 68% would like vocational job training. Further, 26% were formally trained but were unable to find a job in that same occupation. Seventeen percent (17%) were working in an occcupation for which they had been formally trained.

Of those interviewed, 51% said that they would leave the Reservation for employment. Of those, 5% said that they would relocate within Fremont County, 5% would move anywhere within Wyoming, and 82% would relocate anywhere for a job. Eight percent (8%) had no preference for relocation.

Housing (Section 6)

Some of the more serious problems regarding personal housing situations were: 45% needed replacement of doors; 52% needed more insulation; 56% needed storm windows; 43% needed window replacement; 29% stated that their heat was not adequate in cold weather; 4% did not have electricity; 31% had water that tasted bad; 10% did not have hot and cold running water; 37% had problems with floors and walls pulling apart; 24% had roofs that leaked; 45% needed either replacement of door or repair of door jambs to prevent cold drafts; 21% had sub-standard bathrooms (standard is defined as having a stool, tub or shower, and a wash basin that all work properly); and 16% had septic or sewer systems that did not work.

Of the nineteen possible housing problems listed in the questionnaire, 9% had only one problem; 47% had at least five problems; and 24% had ten or more problems with their housing situation.

(Picture Omitted in Printing)

Of all respondents, 23% currently lived with relatives or friends.

Of those interviewed, 33% heated their homes with Propane, 25% with wood or coal, 22% with natural gas, and 18% with electric heat. Two percent (2%) did not have any kind of heat.

Transportation (Section 7)

Of those interviewed, 82% said that the lack of transportation was a serious problem at Wind River. Further, 86% felt that a Reservation-wide transportation system was needed. Of eleven suggestions relating to transportation systems, 90% felt that a simple, Reservation-wide bus system would be the most pragmatic and beneficial. Three percent (3%) replied that their children were unable to attend school because of the lack of transportation.

(Picture Omitted in Printing)

Education (Section 8)

Of those interviewed, 37% had attained a high school education. Further, 4% had completed at least four years of college.

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The dropout rate for Wyoming Indian High School at Ethete was 10.8%. The overall Wyoming dropout rate for high-schoolers was 3.3%. The Fremont County dropout rate was 3%.

Of those interviewed, 9% of their family members needed special classes, such as in developmental disabilities, but were not receiving them. Five percent (5%) of their family members were currently in special classes.

Recreation (Section 9)

Seventy-eight percent (78%) thought there were not enough recreation programs for young children, 83% thought that there were not enough for teenagers, and 69% felt that there were not enough for adults.

Ninety-eight percent (98%) stated that recreation programs are very important. When asked why, the primary responses were: 36% said "to keep people out of trouble"; 28% said "something to do"; 8% said "for good health"; 7% said "an opportunity to socialize"; and 10% said that "it discourages substance abuse."

Of those interviewed, 91% thought that there should be bike paths built alongside roadways, as children and youths riding bikes on main roads sometimes put themselves and others in hazardous situations.

Health and Medical (Section 10)

The question was asked, "Do you receive adequate health care from Indian Health Service?" Forty-nine percent (49%) said No. Thirty-eight percent (38%) stated that they were unable to contact a doctor after normal working hours. Fifty-three percent (53%) stated that adult dental services through Indian Health Service were adequate, and 49% stated that children's dental services were adequate. Six percent (6%) needed home nursing services and were not receiving them. Thirty-two percent (32%) needed assistance with nutritional services and 17% needed dietary assistance.

Of those with health coverage, 37% used Indian Health Services, 37% had private health coverage and used local doctors in Lander and Riverton. Fifteen percent (15%) were on Medicare. Forty percent (40%) of those interviewed did not have any kind of health coverage.

(Picture Omitted in Printing)

Twenty percent (20%) currently had serious health problems. Of these problems, 29% constituted alcohol abuse, 13% drug abuse, 20% diabetes, 10% heart conditions, along with other conditions.

Concerning alcohol and drug use at Wind River, the question was posed "Is alcohol use or drug use (separate questions) at Wind River: i) no problem, ii) minor problem, iii) serious or very serious problem?"

> Alcohol use: 94.5% believed that it was a very serious problem at Wind River; 4.1% said it was a minor problem, and 1.4% said it was no problem.
>
> Drug use: 85.6% said it was a very serious problem at Wind River; 11.4% said it was a minor problem; 3% said it was no problem.

Regarding county ambulance services, 70% stated that they were adequate. However, 94% felt that a separate Reservation ambulance service was needed.

With respect to animal control, 99.7% of respondents commented that it ranged from "a problem" to "very serious problem." The comments were many and varied, but basically fell into two categories. Primary responses were as follows:

(1) Small, domestic animals: Too many running loose, need chaining or fencing or some kind of control; many are sick and starving; too many running in the housing areas and into garbage. There should be a limit on the number of pets a family can have; many strays run in large packs and frequently chase people and livestock; animals from surrounding towns are often dumped on the Reservation. A dog pound is needed to license pets and pick up and destroy strays. A spay/neuter clinic is needed. In short, a definite health and safety hazard.

(2) Livestock: Too many on roads and in some housing areas; fencing that needs repair; dead animals frequently on road; need livestock regulations; punish

owners of loose livestock; particularly need horse control; need a veterinarian. This also presents health and safety hazards.

Seventy-three point seven percent (73.7%) of the comments related to small domestic animals and 22.4% related to livestock.

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General Summation

The results of this comprehensive needs assessment clearly show that the Wind River Reservation represents an area that is chronically economically depressed. It is characterized by an astounding high rate of unemployment, and unusually high needs for services in the areas of health, alcohol and drug abuse, education, quality of housing, economic development, sanitation, and related areas.

NOTE TO THE READER

The reader of this executive summary is strongly encouraged to read the full report of the "WINDS" project, as the executive summary is merely brief highlights of the project results. The full report should enable the reader to obtain a more comprehensive perspective of Wind River. The primary intent of the project was to determine the quality of services to the Wind River population and, ultimately, to improve the quality of life. The report clearly confirms and illustrates many of the problems and causes of distress on the Wind River Reservation.

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Supreme Court, U.S.
FILED
APR 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-309

In The

Supreme Court of the United States

October Term, 1988

STATE OF WYOMING,

Petitioner,

v.

UNITED STATES OF AMERICA, SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Wyoming

BRIEF FOR THE RESPONDENTS BRADFORD BATH, DONALD BATH, DHB & CO., GRIFFIN BROTHERS, INCORPORATED, ALBERT HORNECKER, HORNECKER LIVESTOCK CO., INC., ELSIE MARTIN, RICHARD MARTIN, PLB & CO., CHARLES RICHARDSON, AND RALPH FLOYD URBIGKIT.

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April 10, 1989

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STATEMENT OF THE CASE

The Wind River Indian Reservation was formed by the Second Treaty of Fort Bridger, 15 Stat. 673 (1868), with the Shoshone Tribe. (Pet. App. AA, at 793a, hereinafter referred to as Pet. App.) These lands consisted primarily of the watershed of the Wind River from the Wind River Mountains of Wyoming and were considered the choicest and best watered portion of Wyoming. *United States v. Shoshone Tribe*, 304 US 111, 114 (1838). Much to the chagrin of the Shoshone Tribe, the Northern Arapaho Tribe was added to the Wind River Indian Reservation in 1878. *Shoshone Tribe v. United States*, 299 US 476 (1937); *United States v. Shoshone Tribe*, 304 US 111 (1938).

In 1872 the Shoshone Tribe sold to the United States 700,642 acres under the Brunot Agreement, 18 Stat. 291. In 1896 the Shoshone and Northern Arapaho Tribes sold 55,000 acres to the United States under the First McLaughlin Agreement, 30 Stat. 62.

In 1904 the Shoshone and Arapaho Tribes entered into the Second McLaughlin Agreement, 33 Stat. 1016 (Pet. App. at 769a), whereby 1,480,000 acres of the Reservation, essentially its' northern two-thirds, were opened for non-Indian settlement. Of this land approximately 128,986 acres were sold by 1914. Pet. App. at 412a. Another 336,000 acres were withdrawn for a major reclamation project by an Act of March 4, 1921, Ch. 161, 41 Stat. 1367.

The General Allotment Act of 1887, Ch. 119, 24 Stat. 388, 25 U.S.C. § 331, provided for the breaking up of reservation lands, including the Wind River Indian Reservation, into allotments to be given to the individual tribal

members. This was in addition to the allotments which were provided for in the Treaty of 1868. For a trust period of 25 years the General Allotment Act of 1887 provided that the Indian allottee owner could make application for fee ownership. After which time the fee owner could alienate the land as he wished, including selling to a non-Indian. Forty-two thousand acres of land on the Reservation have passed out of individual Indian ownership to non-Indians since the early 1900's. Wyo. Ex. PW-2.

With the assistance of the Government Agent of the Wind River Indian Reservation, water development proceeded on the Reservation so that by 1905 over 60 permits covering over 123,000 acres of land had been submitted to the Wyoming State Engineer. Wyo. Ex. I & P-101.

The Respondents of this brief, all non-Indian farmers and ranchers on the Wind River Indian Reservation, are all successors in interest to individual Indian allotments under the General Allotment Act of 1887. In total these individuals represent approximately 1,600 acres of irrigated property. Pet. App. 131a-157a. These individual irrigators were parties to the underlying lawsuit claiming that if the Reservation were given a reserved water right with a priority date of 1868, then they were entitled to the same right as successors in interest to the original allottees on the Reservation. The Special Master and the District Court found against these Respondents, but the Supreme Court reversed finding that these non-Indian successors to Indian allotments must be awarded the reserved water right with an 1868 priority date for the practicable irrigable acreage they can show were irrigated

by their Indian predecessors or put into irrigation within a reasonable time thereafter. Pet. App. 72a-75a.

In the water adjudication suit below, the Wyoming District Court, entered an award to the Tribe of approximately 500,000 acre feet to irrigate approximately 103,000 acres. Fifty-four thousand of the 103,000 acres had been historically irrigated at one time or another and contained under a State Permit. Forty-nine thousand acres were awarded for future projects, of which approximately 20,000 acres had been covered by previous State Permits but had not been put to beneficial use. Pet. App. 267a, 268a.

SUMMARY OF ARGUMENT

The Wind River Indian Reservation, home to the Eastern Shoshone and Northern Arapaho Tribes, was created by treaty with the Shoshone Tribe on July 3, 1868. The original purpose of the Reservation was to provide the Shoshone Tribe (and later the Arapaho Tribe) a certain segment of land and then to civilize and assimilate the Tribes into the American culture. As set out in the treaty, civilization and assimilation were to be achieved through education, allotments of land to individual Indians, and the encouragement of agriculture on those allotments.

The Purposes of the Reservation, i.e., that of creating a homeland and of converting the Tribes from being nomadic hunters and gatherers into a civilized people have long been achieved without the use of an implied water right. Present day irrigation on the reservation

today serves only a secondary purpose of providing limited employment and income to the Reservation.

In the underlying adjudication to all waters on the Big Horn River Basin, which includes the Wind River Indian Reservation, the Wyoming Courts found that Congress impliedly reserved water in the treaty of 1868 to satisfy the purposes of the reservation. They then went on to find that the "purpose" of the reservation was agricultural and quantified that right, using the practicable irrigable acreage method, at approximately 500,000 acre feet of water to irrigate 103,000 acres of land. This award of acre feet was awarded to the Tribes, not to the owners of the agricultural allotments mentioned in the Treaty.

In finding an implied-reservation-of-water for agricultural purposes in the 1868 treaty with the Shoshone Tribe the Wyoming Supreme Court has ignored both the historical context and the specific language of the treaty and misconstrued the purpose of the Reservation as "agricultural" rather than recognizing that agriculture was simply a method to be used at the time of the creation of the Reservation to achieve the real purpose of the treaty, that of civilization and assimilation of the Tribes to the American culture.

As early as 1905 the Wind River Indian Reservation had State Water Permits for 123,000 acres of land within the Reservation. These water rights with 1905 and earlier appropriation dates assured that the farmers of individual allotments who had left their nomadic hunting and gathering ways would have the necessary water to irrigate their land.

The use of an implied water right based upon practicable irrigable acreage should not be applied to the Wind River Indian Reservation as it has no relationship to achieving the original purposes of the Reservation.

ARGUMENT

I. THE PURPOSES OF THE RESERVATION AS SET OUT IN THE TREATY OF 1868 WERE TO PROVIDE A HOMELAND FOR THE SHOSHONE TRIBE AND TO ASSIMILATE THE INDIANS INTO THE AMERICAN CULTURE BY WAY OF EDUCATION AND AGRICULTURE.

A. ASSIMILATION

The policy of assimilating the Indian population into the American culture was officially sanctioned by the United States Congress as early as the Act of March 3, 1819, entitled "an Act making provision for the civilization of the Indian tribes adjoining the frontier settlements."[1] Section 1 of this Act declared that the purpose of the Act was to provide against the further decline and final extinction of the Indian tribes, by introducing among them the habits and arts of civilization, by instructing them in the mode of agriculture suited to their situation and for teaching their children in reading, writing and arithmetic.[2]

Following the end of the Civil War in 1865 it was recognized that the advancing tide of settlement ended

[1] Ch. 85, 3 Stat. 516 (§ 1 codified at 25. U.S.C. § 271).

[2] § 1, 3 Stat. at 516.

the possibility of geographically separating the Indian from the non-Indian. "Assimilation, allotment, and citizenship became the watchwords of official Policy."[3]

In 1868, the United States, although starting into the industrial revolution, was still an agricultural society. In 1870, 48% of the population of the United States lived on farms and made their living from agriculture.[4] Transforming the nomadic Shoshone males into individual farmers of their own allotments and educating their children was seen as insuring the "civilization" of the tribes entering into the Treaty and assimilation into the American culture.

The assimilation of the Tribes into a civilized people through education was set out in the Treaty through Article 7 which provided "In order to *insure the civilization* of the tribes entering into this treaty, the necessity of education is admitted . . . " and the Indians pledged to compel their children between the ages of six and sixteen to attend school where they would be taught the "elementary branches of an English education". (Emphasis added.) Pet. App. at 798a. In Article 3 the United States agreed to build a schoolhouse. Pet. App. at 796a. Under Article 10 the United States agreed to annually furnish teachers to the Indians. Pet. App. at 800a.

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[3] F. Cohen, *Handbook of Federal Indian Law*, 1982 ed., at 106.

[4] *Historical Statistics of the United States, Colonial Times to 1970*, U.S. Dept. of Commerce, Bureau of the Census, Bicentennial Ed., Series D 11-25 Labor Status of the Population: 1870 to 1970.

The further civilization of the Shoshone Tribe was to be accomplished pursuant to the Treaty by the breaking up of tribal ownership of the Reservation through the establishment of allotments for those interested in commencing farming. Article 6 provided for an allotment not exceeding 320 acres in extent to the head of a family who "shall desire to commence farming". Pet. App. at 797a. Any other person over 18 years of age not the head of a family could choose 80 acres for the purposes of cultivation. Pet. App. at 797a. Under Article 7 these allotments, once selected for agriculture, ceased to be held in common with the tribe "but the same may be occupied and held in the exclusive possession of the person selecting it so long as he or they may continue to cultivate it." Pet. App. at 797a. This practice of establishing allotments began with George W. Manypenny, Commissioner of Indian Affairs, in 1854 per authorization of the President of the United States, and continued through the Treaty of 1868 with the Shoshone tribe.[5] Individual ownership of allotments was central to the civilization of the tribes in the 1800's.[6]

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[5] COMM'R IND. AFF. ANN. REP., S. EXEC. DOC. NO. 1, 33d Cong., 1st Sess. 249 (1853); Supra See of F. Cohen, *Handbook of Federal Indian Law*, 1982 ed. "Experiments in Allotments," p. 98-105.

[6] F. Cohen, *Handbook of Federal Indian Law*, 1982 ed., at 131-132; "Common property and civilization cannot co-exist," COMM'R IND. AFF. ANN. REP., SEN. DOC. NO. 9, 25th Cong., 3d Sess. 440, 454 (1838); "It is doubtful whether any high degree of civilization is possible without individual ownership of land," COMM'R IND. AFF. ANN. REP., H.R. EXEC. DOC. NO. 1, 44th Cong., 2d Sess. 381, 387 (1876).

The Treaty further encouraged farming on individual allotments by providing under Article 8 for $100 worth of seeds and agricultural implements for the first year and $25 worth of seeds and implements for the next three years. Pet. App. at 798a-799a. Article 8 further provided for instructions from "farmers", which were to be supplied by the United States, to persons who commenced farming on their individual allotments. Pet. App. at 799a. Article 9 went on to provide an annual stipend of $20 for a period of ten years to each individual engaged in agriculture whereas Indians who were "roaming" were to only receive $10 for that ten-year period. Pet. App. at 800a-801a. Finally Article 12 provided for $50 in presents to each of the ten best farmers of the Tribe for a period of three years.

As graphically shown in the Treaty of 1868, the provisions regarding agriculture were all designed as *incentives* to coax *individual* Indians into "commencing farming" on their own allotments. Except for the ownership of the allotment, all incentives were of a limited duration. There were *absolutely no* provisions made in the Treaty for "tribal" development or ownership of agricultural land. "Doubtless the rule that treaties should be so construed as to uphold the sanctity of the public faith ought not to be departed from. But that salutary rule should not be made an instrument for violating the public faith by distorting the words of a treaty, in order to imply that it conveyed rights wholly inconsistent with its language and in conflict with an act of Congress, and also destructive of the rights of one of the states."[7]

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[7] *Ward v. Race Horse*, 163 US 504 (1896) at 248.

The last act of recognizing the civilization of the Tribes came in the form of U.S. citizenship for the tribes. For the first twenty years of the Wind River Indian Reservation the members of the Shoshone and Arapaho Tribes were not recognized as citizens of the United States. Following the General Allotment Act of 1887 citizenship could be conferred upon two classes of Indians born in the United States: (1) those to whom allotments were made by law or treaty; and (2) those who voluntarily lived away from their tribes and adopted the habits of civilized life.[8] All members of the Wind River Indian Reservation were finally recognized as civilized and made American citizens under the Citizenship Act of 1924.[9]

B. HOMELAND

Article 2 of the Treaty of 1868 provides that the Wind River Indian Reservation was " . . . set apart for the absolute and undisturbed use and occupation of the Shoshone Indians within named . . . ". Pet. App. at 795a. Article 4 of the Treaty went on to provide " . . . they will make said Reservations their permanent home, and they will make no permanent settlement elsewhere; . . . " Pet. App. at 796a.

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[8] Ch. 119, § 6, 24 Stat. 388, 390 (codified as amended at 25 U.S.C. § 349).

[9] Ch. 233, 43 Stat. 253 [codified as carried forward at 8 U.S.C. § 1401(b)].

Despite the fact that the Reservation as set out in Article 2 was to become the permanent home of the Shoshone Tribe, and later the Arapaho Tribe, the Wind River Indian Reservation was, nevertheless, substantially reduced in size by the Tribes and the U.S. Government three times by 1905. Over half of all irrigable acreage went out of Indian ownership through these sales of Reservation land.

Indian ownership of the Reservation was further diminished through the sale of allotments by individual Indians to non-Indians through the General Allotment Act of 1887.[10] Respondents listed in this brief are all non-Indian owners in fee of land originally allotted to individual members of the Tribes.

Under the General Allotment Act of 1887 designated quantities of land were allotted to reservation Indians. The allotments were to be held in trust for at least 25 years at which time the Indian could request a fee Patent which would take the property out of trust and make it subject to State civil and criminal law. Surplus lands in excess of the allotments were to be sold.

The General Allotment Act of 1887, which included the Wind River Indian Reservation obviously altered the definition of "permanent home" as set out in the Treaty. "That 'a treaty may supercede a prior act of congress, and an act of Congress supercede a prior treaty' is elementary."[11]

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[10] ch. 119, 24 Stat. 388 (codified as amended 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, 381).

[11] *Ward v. Race Horse*, 163 US 504 (1896) at 511.

Although the attitude of total assimilation and elimination of the Reservation changed beginning in the late 1920's and certain unsold lands of the 1905 succession were returned to Indian ownership, nevertheless, the intent of Congress in 1868 was civilization and assimilation. The General Allotment Act took this a step farther with total elimination of the Reservation in mind.

II. GIVEN THE DEFERENCE TO STATE LAW NORMALLY ACCORDED BY CONGRESS IS AN IMPLIED-RESERVATION-OF-WATER NECESSARY TO FULFILL THE PURPOSES OF THE RESERVATION.

A. WYOMING FOLLOWS THE SYSTEM OF PRIORITY OF APPROPRIATION TO THE WATER OF THE STATE.

Congress, when admitting Wyoming to the Union, Wyoming Admission Act, 26 Stat. 222 (July 10, 1890), expressly accepted, ratified, and confirmed the Wyoming Constitution which provided that all waters within the boundaries of Wyoming were property of the State and adopted the system of priority of appropriation.[12] The Wind River Indian Reservation was wholly contained within the boundaries of the State of Wyoming at the time of its creation and there were no provisions in the Act of Admission excluding the Reservation from the priority of appropriation system that had been the law of custom in the State since before the creation of the Reservation.

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[12] WYO. CONST. ART. VIII, §§ 1,3.

Water rights acquired under the prior appropriation system are limited in quantity to the amount of water claimed at the date of appropriation and to the amount actually applied to beneficial use. In times of shortage, the holders of junior rights, those with later priority dates, must forego their use of water from a particular water source in favor of senior appropriators on the same water course.

The doctrine of prior appropriation developed as settlers came west following discovery of gold in California in 1848. They quickly realized that the riparian doctrine of water rights that had served well in the humid regions of the east would not work in the arid lands of the west. Priority of appropriation is recognized in one form or another in all of the mainland western states.[13]

The Treaty of 1868 made no mention of a reservation of water for the Wind River Indian Reservation. In other words, Congress was silent as to whether or not there was reserved for the Wind River Indian Reservation water for irrigation or whether the Reservation would be subject to the system of prior appropriation. However, both two years before the signing of the Treaty in 1868 and two years later, in 1870, Congress enacted statutes recognizing the system of prior appropriation.[14] These two statutes expressly confirmed acquisition of water

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[13] F. Cohen, *Handbook of Federal Indian Law*, 1982 ed., at 576.

[14] Act of July 6, 1866, Ch. 262, § 9, 14 Stat. 251, 253 (codified at 30 U.S.C. § 51), Act of July 9, 1970, Ch. 235, § 17, 16 Stat. 217, 218 (codified at 43 U.S.C. § 661).

rights in accordance with the local custom and laws of prior appropriation and made clear that water rights acquired in this manner were valid against both the federal government and all federal grantees.[15]

Congress deferred to the system of prior appropriation under Wyoming State law in regards to the Wind River Indian Reservation in the Second McLaughlin Agreement of 1904, ratified by Act of March 3, 1905, 33 Stat. 1016. In passing the McLaughlin Act Congress resisted lobbying attempts for the creation of an express limited reserve water right.[16] Again in 1914, Congress resisted efforts to create an express reserved water right on behalf of the Wind River Indian Reservation.[17]

B. THE COURTS IMPLY A RESERVATION OF WATER WHEN NECESSARY TO FULFILL THE PURPOSES OF THE RESERVATION.

The Supreme Court has held that when the government withdraws its land from the public domain and reserves it for a federal purpose, the government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.[18]

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[15] See *California v. United States*, 438 US 645, 656 (1978); *Broder v. Natoma Water and Mining Co.*, 101 US 274, 276 (1879); *Jennison v. Kirk*, 98 US 453 (1879).

[16] Wyo. Exh. WRIR I & P. 6.

[17] See United States Senate, Hearings before the Committee on Indian Affairs, March 12, 1914, at 279, Wyo. Exh. WRIR I & P, 16.

[18] *Winters v. United States*, 207 US 564 (1908); *Arizona v. California*, 373 US 546 (1963); *Cappaert v. United States*, 426 US 128 (1976); *United States v. New Mexico*, 438 US 696 (1978).

The case of *Winters v. United States*, 207 U.S. 564 (1908) first set out the "implied-reservation-of-water" doctrine. The *Winters* case concerned the Fort Belknap Indian Reservation in Montana, home of the Gros Ventre and the Assiniboine Tribes created by Act of Congress on May 1, 1888. Approximately thirty thousand acres on the Reservation were susceptible of irrigation with the waters of Milk River which forms the northern boundary of the Reservation.[19] Although the United States alleged that on the 5th day of July, 1898, the Indians residing on the Reservation diverted ten thousand miners' inches of water from the river for irrigation of 30,000 acres of land[20], nevertheless, the Ninth Circuit found that only five thousand acres of the thirty thousand acres was actually being irrigated and that five thousand inches of water were required to meet the needs and requirements of the government and Indians for household, domestic, agricultural and irrigating purposes on the Reservation.[21]

Beginning in 1895, Winters and other white settlers upstream from the Belknap Reservation began diverting water and by 1905 had diverted the entire flow so that no water reached any part of the Reservation by way of the Milk River.[22] The United States was then successful in the District Court in permanently enjoining the white settlers from interfering in any manner with the use of five

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[19] *Winters v. United States*, 143 F. 740 (1906).

[20] *Winters*, Supra, 207 US at 566.

[21] *Winters*, Supra, 143 F. at 741.

[22] *Winters*, Supra, 143 F. at 741.

thousand inches of the waters of the Milk River by the Fort Belknap Reservation.

The Ninth Circuit and the United States Supreme Court both upheld the injunction finding that the Treaty impliedly reserved the right to use the waters of the Milk River to the extent reasonably necessary to irrigate Reservation lands to accomplish the purpose of the Reservation and that the purpose of the Reservation was to change the Indians "nomadic and uncivilized" habits and to make them into a "pastoral and civilized people."[23]

The *Winters* holding of an implied-reservation-of-water was subsequently applied by the Courts to other reservations of land by the U.S. Government.[24]

This Court has fully realized that a "careful examination" is required whenever imposing an implied water right on a river system because: 1) the reservation is implied, rather than expressed; 2) the history of Congressional intent in the field of Federal – State jurisdiction with respect to the allocation of water almost invariably defers to State law, and 3) it has recognized that in the arid parts of the West claims for the use of water on Federal Reservations inescapably compete with other public and private claims for the limited quantities of

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[23] *Winters*, Supra, 207 US at 576.

[24] *United States v. District Court for Eagle County*, 401 US 520 (1971); *Cappaert v. United States*, 426 US 128 (1976); *United States v. New Mexico*, 438 US 696 (1978).

waters to be found in the rivers and streams, often resulting in a "gallon for gallon" reduction in the amount of water available for water-needy state and private appropriators.[25] As set out in the brief for Petitioner, State of Wyoming, the water of the Wind River drainage which supplies all the water to the Wind River Indian Reservation is fully appropriated.

The Supreme Court has repeatedly emphasized that Congress reserved "only that amount of water *necessary* to fulfill the purpose of the Reservation, *no more*." *Cappaert*, supra at 141. (Emphasis added.) "Each time this Court has applied the 'implied-reservation-of-water doctrine' it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be *entirely defeated*."[26] (Emphasis added.)

Thus, in *Cappaert* pumping of underground water threatened the very existence of the underwater ecological system of Devil's Hole National Monument. If pumping had been allowed to continue the lakes would have dried up, the unique pupfish would have died out and the purposes of the National Monument would have been entirely defeated. The Court in *Cappaert* curtailed the pumping only to the extent necessary to preserve an adequate water level at Devil's Hole. "No more" water was reserved than to fulfill the purpose of the Reservation.

[25] *U.S. v. New Mexico*, Supra, at 1057.

[26] *United States v. New Mexico*, Supra, at 1057.

Again in *Winters*, by 1898 the U.S. Government had the Indians of the Reservation farming ten years after the formation of the Reservation. However, by 1905, the upstream appropriators had appropriated the full flow of the river. The very purpose of turning these nomadic Indians into a pastoral and civilized people would have been entirely defeated if the Court had not intervened. The Court, although recognizing thirty thousand practicable irrigable acres along the Milk River, nevertheless, granted an injunction to only the reasonable needs of the Reservation to civilize its Tribes when it gave five thousand miners' inches, declared by the Court to be sufficient to provide the water for domestic use, stock watering and irrigation of five thousand acres.

C. AN IMPLIED-RESERVATION-OF-WATER IS NOT "NECESSARY" TO FULFILL THE PURPOSES OF THE RESERVATION.

Unlike the Fort Belknap Reservation in *Winters* and Devil's Hole in *Cappaert* the Wind River Indian Reservation was never faced with a situation where the purposes of the Reservation would be "entirely defeated" without an implied-reservation-of-water. Nor has it ever been "necessary" to infer an implied reservation of water to fulfill any of the purposes of the Wind River Indian Reservation.

In 1905, the same year the United States sought the injunction in *Winters*, the Wind River Indian Reservation had sixty state water permits covering 123,588 acres. This 1905 right is senior to most other rights on the stream and has always been sufficient to irrigate the allottees crops

on the Reservation. By 1915 this amount had been increased to 145,000 acres.

The total award of water by the Wyoming Supreme Court to the Tribes of the Wind River Indian Reservation was 103,000 acres. Of this 54,000 acres consisted of acreage which had been irrigated in the past and 49,000 acres consisted of future projects. Most, if not all of the 54,000 historically irrigated acreage is under one of these 1905 permits. The rest were part of allotments sold to non-Indians and some were never put under irrigation or became unproductive.

It seems a little bizarre now that the Wyoming Supreme Court is stating that water for 103,000 acres will *fulfill* the "purpose" of the Reservation when 123,588 acres didn't fulfill the purpose of the Reservation in 1905.

D. THE IMPLIED RESERVATION OF 500,000 ACRE FEET WILL NEVER "FULFILL" THE PURPOSE, AS SET OUT BY THE WYOMING SUPREME COURT, OF MAKING THE WIND RIVER INDIAN RESERVATION AN "AGRICULTURAL RESERVATION".

The Wyoming Supreme Court found that the Wind River Indian Reservation was intended to be an "agricultural" Reservation and thus applied the practicable irrigable acreage standard set out in *Arizona v. California*, 373 US 546 (1963). Pet. App. 32a-41a. Nevertheless, it is obvious from a reading of the Treaty that agricultural was one of the means by which to "civilize" the Shoshone and Arapaho Tribes in the late 1800's but not the purpose of the Treaty.

Agriculture plays a very small part in civilization as it exists today in either the United States or on the Wind River Indian Reservation. As stated before 48 percent of the United States population in 1870 resided on farms and made their livelihood thereon. By 1986 this percentage had fallen to 2.2 percent of the nation's population. [27] Nationally the percentage of Indians employed in agriculture declined from approximately 68 percent in 1940 to 8 percent in 1980.[28] This percentage corresponds with the Wind River Indian Reservation which in 1988 had 8.1 percent of those people employed on the Reservation being involved in agriculture, which 8.1 percent represented 3 percent of the total work force of the Reservation.[29] Giving the Reservation an 1868 priority date and doubling the amount of presently irrigated acres under that award is simply not going to make the Wind River Indian Reservation into an "agricultural" Reservation in the 1980's.

Unlike the Tribes in *Arizona v. California*, who derive most of their income from agriculture, only 3 percent of the income from natural resources on the Wind River

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[27] *Agricultural Statistics 1987*, U.S. Department of Agriculture, Table 549, at 382.

[28] Habrfeld and Musnick, *Indian Economic Development Resources: A Question Of Use, Organization and Control As Much As One of Quality*, in the *ECONOMIC DEVELOPMENT AND LAW CENTER REPORT* 11(June/Feb. 1980).

[29] "W.I.N.D.S." Project - Wind River Indian Needs Determination Survey conducted by the Shoshone and Arapaho Tribes; August 1988.

Indian Reservation came from agricultural production.[30] This percentage is even smaller when you take into account the amount of income derived from other employments besides agriculture by which 92 percent of those employed make their livelihood.

The Tribes in their Cross-Petition for Writ of Certiorari allege that the implied-reservation-of-water with a priority date of 1868 is necessary to provide employment on the Reservation which currently has an unemployment level of 70 percent. [31] In reality, though, the award of the Wyoming Supreme Court of 103,000 irrigated acres with a water right of 1868 would have very little impact on the unemployment rate of the Reservation for two obvious reasons.

The first is that, as pointed out above, only 3 percent of the present day work force on the Reservation is involved in agriculture. If we doubled the amount of acreage from the 54,000 historical acres irrigated to the

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[30] U.S. Department of the Interior, *Report of the Task Force on Indian Economic Development* 32 (1986).

[31] Brief in Opposition for Respondents and Cross-Respondents Shoshone and Northern Arapaho Tribes, November 21, 1988 at 32 and 37. "The water quantified under the PIA standard is desperately needed to improve the economy of the Reservation, where, according to a Governmental study released last month, the unemployment rate among Indians is in excess of 70 percent." The governmental study referred to in that footnote was the "W.I.N.D.S." Project previously referred to in note 27, Supra. The W.I.N.D.S. Project listed the unemployment rate for Arapaho's at 70 percent, Shoshone's at 71 percent, other Indian Tribes at 78 percent and non-Indians at 52 percent, Volume 1 at 4.

103,000 of the award and were able to immediately irrigate those future projects, then the work force employed in agriculture would, theoretically speaking, double from 3 percent to 6 percent and the unemployment rate of the Reservation would drop from 70 percent to 67 percent.[32] Also the amount of income from agriculture on the Reservation would raise from 3 percent to 6 percent of the total derived from natural resources. Obviously, no matter what is done as a result of this lawsuit, the end result will not "fulfill" the purpose of the Reservation as set out by the Wyoming Supreme Court, i.e., that of making an "agricultural" Reservation.

Secondly, despite the high unemployment levels of 70 percent (up from 45 percent in 1982)[33] Indian irrigable land under ditches is going out of production. "Idle" land has risen from 6,271 acres in 1982 to 9,227 in 1987.[34] This

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[32] The correlation between unemployment and water for agriculture is pretty slim. A much higher correlation exists between unemployment and alcoholism, estimated at 80% of the adult Indian population by the ShoRap Treatment Center, a joint tribal alcohol treatment facility on the Reservation.

[33] The unemployment figure came from the 1982 report of Special Master Roncalio. Pet. App. at 568a.-69a. Department of the Interior, Bureau of Indian Affairs, *National Resource Information System, 1987 Inventory and Production Report for the Wind River Indian Reservation.*

[34] Department of the Interior, Bureau of Indian Affairs, *National Resource Information System, 1987 Inventory and Production Report for the Wind River Indian Reservation.* Of the 32,599 acres of Trust land owned by Indians, 16,995 are used and irrigated by Indians, 6,417 acres are irrigated and leased to non-Indians and 9,227 acres sit idle. In other words only half of the Trust lands, are actually operated by Indians. Almost one-third of all Trust land lies idle.

represented 28 percent of all Indian land listed under projects and private ditches in 1987.[35] Although the work force is amply available and acreage under ditches are just waiting for water to be beneficially applied the Wind River Indian Reservation Indians are more interested in pursuits other than agriculture.

One of the obvious reasons that more Indians don't go into farming is that the economical rewards simply do not justify the outlay in time and money. "The U.S. agricultural sector throughout the 1980's has been beset by problems of insufficient demand and excess supply. In order to try to hold up farm prices the Federal Government has poured many billions of dollars into supporting these prices . . . The U.S. as a whole today needs less land in food production, not more. In short, agriculture offers little promise of making any substantial new contributions over the next few years to Indian economic development".[36]

Agriculture today is a highly mechanized industry. Indians are not going to go off the unemployment roles and into agriculture with the $100 worth of implements and seeds guaranteed by the Treaty. The Treaty was fashioned for Indians to become farmers in the late 1800's not 1980's. The only ones who would benefit from the award of water would be those already involved in agriculture

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[35] U.S. Department of the Interior, *Report of the Task Force on Indian Economic Development* (1986) at 120.

[36] U.S. Department of the Interior, *Report of the Task Force on Indian Economic Development* (1986) at 120.

with capital to expand on expansion not unemployed Indians who want to "commence farming".

The Tribes themselves realize that the true value of getting an 1868 award of 500,000 acre feet of water lies not in utilizing that award in agriculture. In their Cross-Petition for a Writ of Certiorari the Tribes state: "Transfers of water play a central role in insuring the efficient use of this scarce resource in the American West. A smoothly operating market system assures that water can be moved from outmoded uses to new, more cost effective ones . . . [and it] would provide the Tribes with a source of critically needed funds . . . "[37]

In contrast to agriculture, education is seen by most residents of the Wind River Indian Reservation as the way of reducing their unemployment levels. 68 percent of the Wind River Indian Reservation adults have completed high school.[38] Less than 2 percent have less than an eighth grade education.[39] The most important statistic is that 41.4 percent were intending to return to school.[40]

The water necessary to fulfill the purpose of the Wind River Indian Reservation has already been appropriated under Wyoming State law with a water right senior to most all other appropriators on the system. Neither an earlier priority date nor an additional award of water to be used in the future will ever *fulfill* the purpose of the Reservation more than that purpose was actually fulfilled in 1905 under State law. In regards to

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[37] Cross Petition for a Writ of Certiorari to the Supreme Court of Wyoming filed by the Northern Arapaho and Shoshone Tribes, Sept. 21, 1988 at 26-27.

[38] W.I.N.D.S. Project, Supra, final report, Vol. I at 23.

[39] W.I.N.D.S. Project, Supra.

[40] W.I.N.D.S. Project, Supra.

the Wind River Indian Reservation this Court should defer to the State law which already protects both the Indian allottees and their successors in their right to a sufficient amount of water to irrigate their lands.

III. THE EVILS OF BEING AWARDED A RESERVED WATER RIGHT

A. THE DILUTION OF THE WATER RIGHT

Prior to this lawsuit both the Indian irrigators and the non-Indian Respondents of this Brief enjoyed primarily a 1905 priority date under State permit. They were recipients of the applications by the U.S. Government in 1905 for permits to irrigate 123,000 acres on the Reservation.[41] Only about 65,000-70,000 acres of the original 123,000 acres actually ever went into production. This includes most of the 54,000 acres of the historically irrigated land of the Indians and approximately 10,000-15,000 acres of the non-Indian owned allotments. This 1905 right is senior to over half of the irrigated acreage on the Reservation. The Riverton Reclamation Project alone accounts for most of the non-Indian owned acreage with 102,000 acres irrigated under a 1906 permit.

The ruling of the Wyoming Supreme Court gave the "Tribes" a reserved water right to the water necessary to

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[41] Any land presently irrigated not specifically contained under a Permit can either have a water right transferred from non-irrigated acreage under the same ditch or can get a water right with a priority date of first application to beneficial use. W. S. 41-3-103, 104; *Merrill v. Bishop*, 27 P.2d 620 (Wyo 1955); Pet. App. 129a-130a.

irrigate the practicable irrigable acreage on the Reservation. This included the "diminished-Reservation" lands which had gone out of tribal ownership in 1905. Pet. App. 72a. This also includes any non-Indian owned lands which are reacquired by an Indian or Tribal purchaser of non-Indian ownership. Pet. App. 751. Once this land is reacquired by an Indian or the Tribe, it could then be sold again to a non-Indian with the reserved water priority date of 1868. Pet. App. 73a-75a.

Potentially then there are approximately 170,000 acres of presently irrigated or historically irrigated land which could be put under the 1868 right, as well as another 49,000 acres under future projects awarded to the Tribes. All of this would come under the practicable irrigable acreage standard of *Arizona v. California*, 373 US 546 (as adopted by the Wyoming Supreme Court). If the decision were left standing based upon practicable irrigable acreage of the Reservation at the time the Reservation was created, then it would only be a matter of time before all irrigable property on the Reservation was sold back into Indian ownership and, more than likely, back into non-Indian ownership, thereby acquiring an 1868 priority date for well over 200,000 acres in the Wind River Basin. This end result would destroy the senior rights of the Indian allottees and their successors on the Reservation, presently enjoyed with their 1905 right under State law.

As set out in the Treaty of 1868, agriculture was meant as an incentive to *individual* Indians to cease their nomadic ways. Incentives consisted of individual ownership in land, money for implements and seeds, and increased stipends for the first ten years. There is absolutely nothing in the Treaty which gives any implied right

to the Tribe as a whole to quantify a "Tribal" water right. The only water right that ever could have possibly been intended to have attached to the Reservation were to the allotments which were put into irrigation by the original allottees or their successors. The Indian and non-Indian owners of those allotments now face a factual scenario where their 1905 priority date, which was senior in right to over 70 percent of the practicable irrigable acreage in the Wind River Basin on the Wind River Indian Reservation, being awarded an 1868 water right which will ultimately be senior to no other rights in the Wind River Basin. Furthermore, the water right of Indian allottees will no longer be owned by them personally, but have been awarded to the "Tribes".

Even in the water-short year of 1988, only junior appropriators to 1906[42] had their water turned off to satisfy senior appropriators. If the whole basin were under an 1868 priority date, those who currently have a 1905 right would lose their priority over the rest of the Basin and have to share the limited quantities of water, which can be mighty slim indeed in late summer.

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[42] Some 1905 rights on the Reservation were turned off in 1988 when the Tribes with their 1868 water right made a false "call" on the river to acquire water of junior 1905 appropriators. The Tribes later acknowledged that the shortage of water was due to Project mismanagement rather than an actual shortage of water. See Ex. B, third paragraph, of Brief in Opposition for Respondents and Cross-Respondents Shoshone and Northern Arapaho Tribes.

B. THE USES TO WHICH AN IMPLIED-RESERVATION-OF-WATER CAN BE PUT TO IS MORE RESTRICTIVE THAN A RIGHT UNDER STATE LAW.

Under Wyoming State law the procedure is available for changing the place of use and for changing the use itself.[43] However, because an implied-reservation-of-water right is only for the specific purposes of the Reservation as deemed at the time of the enactment of the Reservation, it therefore follows that the reserved water cannot be transferred into another use and retain the same priority date.[44] "Where water is only valuable for a secondary use of the Reservation, however, there arises the contrary inference that Congress intended, consistent with its' other views, that the United States would acquire water in the same manner as any other public or private appropriator."[45] Therefore, the water which irrigates the land on the Reservation could not be transferred to a better use on or off the Reservation or, should their property become unproductive, that water right could not be transferred to other irrigable property purchased by them off the Reservation.

If the tribes get an 1868 priority date then the Respondents of this brief have no alternative but to acquire an 1868 priority date under the Wyoming Supreme Court decision in order to protect themselves from a "call" on the river by their 1868 priority date neighbors. However, the award of an 1868 water right to

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[43] WS (1977), §§ 41-3-103, 104.

[44] *United States v. New Mexico*, 438 US 696 (1978).

[45] *United States v. New Mexico*, 438 US 696, 702 (1978).

the Tribes to all practicable irrigable acreage on the Wind River Indian Reservation would ultimately give the Respondents of this Brief, all non-Indian irrigators on the Reservation, as well as all Indian owners of irrigated allotments a water right that would be senior to the right presently enjoyed by them, but ultimately inferior in every respect to the rights presently enjoyed under state law.

CONCLUSION

The decision of the Wyoming Supreme Court should be reversed and remanded with instructions to enter a Decree denying a Federal reserved water right to the Wind River Indian Reservation, affirming those water rights currently irrigated under State Permits with the corresponding priority dates, or with a priority date of first application of water for beneficial use for those acreages not covered by a State Permit.

Respectfully submitted,

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No. 88-309

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF WYOMING,
Petitioner,
v.
UNITED STATES OF AMERICA, SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Wyoming

REPLY BRIEF FOR THE PETITIONER

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On Writ of Certiorari to the Supreme Court of Wyoming

REPLY BRIEF FOR THE PETITIONER

ARGUMENT

The briefs of Respondents United States and Tribes (1) raise and misstate new authorities, (2) inaccurately characterize the position of the Petitioner below, (3) contain references to materials outside of the record in an effort to bolster the absence of any record evidence that the reserved water right awarded is actually needed by the Reservation, (4) misstate the effect of post-decision activities.

I. Contrary to the Tribes' assertion, the State of Wyoming's position is entirely consistent with *United States v. Hampleman* and *United States v. Parkins*.

The Tribes suggest [1] that Wyoming creates a misimpression that this matter is the first to address reserved

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[1] Respondent Tribes' Brief, p. 14, referencing the State of Wyoming's Brief for the Petitioner, at 19-20.

water rights under the 1868 Treaty.[2] In straining to support their contention, however, it is the Tribes who may mislead this Court regarding the proper standard of quantification for the Reservation's reserved water right.

The Tribes cite *United States v. Hampleman*,[3] for the proposition that the United States has previously successfully claimed a reserved water right for the Reservation. At Note 7 of their brief, the Tribes cite from the complaint in *Hampleman* to the effect that "[I]t was the intention of the parties to said treaty that all water wihin the boundaries of said reservation . . . should be reserved for the perpetual use of said Indians."[4] It is the omitted language of this reference, however, which is pertinent to the issue before the Court. The entirety of the reference reads:

> "[T]hat it was the intention of the parties to said treaty that all water within the boundaries of said reservation, *reasonably necessary for supplying the domestic needs of said Indians, watering their livestock, and the irrigation of their lands*, should be reserved for the perpetual use of said Indians as appurtenant to the lands of said reservation . . ."

(emphasis added).

The Tribes also neglect to cite the court's decree in *Hampleman*, as it regards the issue before this Court.[5] In pertinent part, it states that Mr. Hampleman was enjoined:

> "[F]rom interfering with or preventing the use by said Indian allottees of an amount of water from

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[2] Treaty with the Eastern Band of Shoshone and Bannock, 1868, J. 15, Stat. 673 (1868), a/k/a Second Treaty of Fort Bridger.

[3] No. 753 (D. Wyo. 1913). Mr. Hampleman was a state administrative official referred to as a "water commissioner." He was sued in his individual capacity.

[4] Bill of Complaint, Appendix A hereto, at 3a.

[5] Decree, Appendix B, hereto, at 13a.

> said streams *reasonably necessary* for the irrigation of their said allotments . . ."

(emphasis added).

The complaint and decree in *Hampleman* are plainly consistent with Wyoming's assertion that water rights for the Reservation are to be quantified to meet its needs, not by rote application of the PIA standard.[6]

II. Contrary to the arguments of the United States and Tribes, the State of Wyoming did not embrace the "practicably irrigable acreage" standard throughout the course of the proceedings below.

The United States and Tribes represent and argue that the State of Wyoming has taken inconsistent positions on the standard of quantification. They suggest that, although it attacks the "practicably irrigable acreage" standard before this Court, the State actually embraced that same standard throughout the course of the proceedings in the Wyoming courts below. For example, the United States advises the Court:

> [the State of Wyoming] maintained throughout the trial that "if a reserved water right was created on behalf of the Wind River Indian Reservation, it was created solely to provide the Indians living thereon with a supply of water for domestic uses, *for the irrigations of all practicably irrigable land on said Reservation* and for stockwatering purposes.[7]

What the United States fails to mention, however, is that the State took that alternative position in its first responsive pleading, in which it was earlier stated:

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[6] Wyoming's position on quantification is equally consistent with *United States v. Parkins*, 18 F.2d 642 (D. Wyo. 1926). The *Parkins* court identified no purpose for the reserved water right which it assumed to exist other than irrigation, the sole purpose for which Wyoming asserts that a reserved right may be quantified for the Reservation.

[7] Brief of the United States, p. 19, emphasis in original.

III. *Limitation of the Reserved Right Generally*

> With respect to any reserved right which the Court may determine to exist on behalf of the United States or Tribes in this litigation . . .:
>
> * * * *
>
> 4. Wyoming affirmatively asserts that, with respect to each reservation herein, the United States intended to reserve only the minimal amount of water necessary to prevent the primary purposes of the reservation from being entirely defeated.[8]

While the alternative nature of Wyoming's response could have been more artfully drafted, it certainly created no confusion in the minds of the litigants or for the Wyoming courts. For example, the issues to be litigated were set forth in the pre-trial order:

> 5. *Contested Issues of Law*
>
> * * * *
>
> C. What is the proper measure for those reserved water rights?
>
> * * * *
>
> G. What the parameters are of any reserved water right that might have been created in Wyoming, including but not limited to:
>
> (i) Whether the amount reserved is the quantity of water which is absolutely necessary to prevent the purposes of the reservation from being entirely defeated; or
>
> * * * *
>
> (iii) Whether the quantity of water reserved for the Wind River Indian Reservation, if any, is the amount of water sufficient to irrigate all the practicably irrigable

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[8] Respondent Tribes' Brief, Appendix A, p. 2a.

> acreage on the reservation and for related domestic and stock-watering uses only . . . .[9]

Thereafter, the legal question of the appropriate quantification standard was one of the primary issues in controversy.

III. References to materials outside the record of the proceedings below do not assist and may mislead the Court.

The Tribes and United States frequently refer to material outside the recording of the proceedings below to bolster their argument that a reserved water right award for PIA is calculated to meet the Reservation's needs. For example, although at trial the Tribes presented no evidence of their need for the award, the Tribes now rely on the report of the post-trial "WINDS Project" [10] to demonstrate that the Reservation is in need of water.[11] Such extra-record material should be viewed with skepticism since it constitutes nothing more than a belated attempt to obscure the absence of record evidence supporting the Respondents' arguments. For example, the Reservation's tax commissioner has been quoted as saying:

> If the U.S. Supreme Court does not agree with the tribal PIA standard, then the recently completed Wind River Indian Needs Determination Survey (WINDS) would suffice to show the requirement for future usage to develop the reservations's economy.[12]

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[9] Order of Pre-trial Conference and Order on Motions, November 10, 1980, Appendix C, hereto, p. 14a.

[10] Respondent Tribes' Brief, Appendix E, at p. 25a.

[11] Respondent Tribes' Brief, pp. 46-47.

[12] *Chiefs Gazette*, Wyoming Indian High School Student Newspaper, February 1989 issue.

Even the WINDS report, however, does not demonstrate how the award of yet another reserved water right will ameliorate the problems of the Reservation described by the report.

IV. Contrary to the assertion of the Tribes, the State of Wyoming did not seek to create the impression that the Tribes and the State are on the verge of open warfare.

The Tribes assert that the State of Wyoming sought to create the impression that the Tribes and the State are on the verge of warfare,[13] and that an agreement on water and tax issues[14] was entered into to gain an advantage in the litigation. To the contrary, the State of Wyoming agrees with the Tribes in their assertion that relations between these sovereigns have improved. Wyoming was prompted to enter an interim one-year agreement with the Tribes in which the State agreed to forego tax revenues from the Reservation and provide other funds primarily for the purpose of preventing the Tribes' enforcement of their federal reserved water right during 1989.[15]

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[13] Respondent Tribes' Brief, p. 19.

[14] It is anticipated that the Court's ruling in *Cotton Petroleum v. New Mexico*, 106 N.M. 517, 745 P.2d 1170 (N.M. App. 1987), prob juris. noted, 108 S.Ct. 1466, 99 L.Ed.2d 696, will substantially resolve the "long standing dispute regarding this overlapping taxation." Respondent Tribes' Brief, p. 20, fn. 26.

[15] The State of Wyoming originally stated that Wyoming was prompted to enter the interim one-year agreement "simply to prevent the Tribes' enforcement of their Federal reserved water rights during 1989." State of Wyoming's Brief for the Petitioner, p. 10.

CONCLUSION

The judgment of the Wyoming Supreme Court, insofar as it affirmed the award to the Tribes of a federal reserved water right based on a quantification established by practicably irrigable acres, rather than any concept of necessity, should be reversed and remanded with instructions to enter a decree awarding a federal reserved water right in only the amount of water necessary to irrigate those historically irrigated Indian lands within the Wind River Indian Reservation, which are not and have never been awarded state water rights.

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APPENDICES

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF WYOMING

No. 753

UNITED STATES OF AMERICA,
Plaintiff,

-vs-

ALBERT HAMPLEMAN,
Defendant.

BILL OF COMPLAINT

TO THE HONORABLE JUDGE OF THE DISTRICT COURT FOR THE DISTRICT OF WYOMING:

The United States of America, in its own behalf and in behalf of its wards, the Shoshone Indians hereinafter named, residing in the state and district of Wyoming, by Hilliard S. Ridgely, United States Attorney for said district, acting by direction of the Attorney General, brings this, its bill of complaint, against the defendant, and for cause of action states:

I.

That the Shoshone or Wind River Indian Reservation was established by executive proclamation on the 24th day of February, 1869, pursuant to treaty concluded on the 3rd day of July, 1868, between the complainant and the Eastern Band of Shoshones and the Bannock Tribe of Indians, said treaty being consented to by the Senate of the United States on the 16th day of February, 1869. Said reservation embraced a tract of land within the present judicial district of Wyoming, set apart for the

use and occupation of the Shoshone tribe of Indians, the boundaries thereof being defined by the terms of said treaty as follows:

> Commencing at the mouth of Owl Creek and running due south to the crest of the divide between the Sweetwater and the Papa Agie Rivers; thence along the crest of said divide and the summit of Wind River mountains to the longitude of North Fork of Wind River; thence due north to mouth of said North Fork and up its channel to a point twenty miles above its mouth; thence in a straight line to the head waters of Owl Creek and along middle of channel of Owl Creek to place of beginning;

That by the terms of said treaty the said Shoshone Indian tribe relinquished all title, claims or rights of possession, use or occupancy in and to any portion of the territory of the United States except such as was embraced within the limits aforesaid, and the complainant, as a consideration for such relinquishment of title or rights to any other portion of the territory of the United States, agreed to protect said Indian tribe in the possession and occupation of said reservation, and to establish schools, workshops, and to furnish certain supplies, tools and implements, described in said treaty for the education and industrial advancement of said tribe in the arts of peace and civilization; to encourage habits of industry and thrift among them, and to induce and enable said Indians to engage in and carry on agriculture and stock-raising; said treaty further provided for the selection of tracts of land by such individual members of the tribe as should desire to commence farming.

II.

That the lands included within said reservation are arid in character and incapable of producing agricultural crops successfully without irrigation; that portions of said reservation include lands unfit for cultivation, but

which are adapted to pasturage and grazing and feeding of livestock thereon; that it was the intention of the parties to said treaty that all water within the boundaries of said reservation, reasonably necessary for supplying the domestic needs of said Indians, watering their livestock, and the irrigation of their agricultural lands, should be reserved for the perpetual use of said Indians as appurtenant to the lands of said reservation; that the lands within said reservation have at all times since the creation thereof been used and occupied as the home and abiding place of said tribe of Indians, with the exception of a portion ceded and relinquished by agreement approved by Act of Congress March 3rd, 1905; that prior to said cession certain members of said Indian tribe hereinafter named selected allotments of land within what is now the ceded portion of said reservation, all of which allotments have been approved and patented under the General Indian Allotment Act of 1887.

That Annie Duncan, a member of said Shoshone tribe of Indians, and the head of a family, selected as her allotment of the lands of said reservation the northwest quarter of the southeast quarter (NW¼SE¼), and the northeast quarter of the southwest quarter (NE¼SW¼) of Section twenty-seven (27), township eight (8) north of range three (3) east W. R. M., Wyoming, containing eighty acres of the lands of said reservation, said selection being dated July 8, 1905, approved June 4, 1906, and a tract patent was issued to her therefor by complainant on the 6th day of May, 1907; that about sixty-five acres of her said allotment are under irrigation and in cultivation, producing valuable crops of hay, grain and vegetables; that the water for the irrigation of her said lands is diverted from a non-navigable stream known as the South Fork of Mud Creek, rising and flowing its entire length within the original boundaries of said reservation, and discharging its waters into Owl Creek on the northern boundary of said reservation; that

the waters of said South Fork of Mud Creek are her only source of supply for domestic use, livestock, and the irrigation of her allotment lands, and such water is necessary for the cultivation of her allotment and the maturing of crops thereon; that the use of one cubic foot of water per second of time of the flow of said stream is reasonably necessary for the irrigation of and the production of crops on her said allotment of land; that said Annie Duncan is married to William Duncan, to which union have been born the following named Indian children, all being minors: Robert L. Duncan, Francis C. Duncan, William E. Duncan, Clyde Duncan, Bessie Duncan, Eva Duncan and Ida Mae Duncan; that Francis C. Duncan and Bessie Duncan are now deceased; that Annie Duncan, the mother of said children and head of an Indian family as aforesaid, made the following described allotment selections of land on said reservation for her minor children above named on the 8th day of July, 1905, all of which were approved on the 4th day of June, 1906, a trust patent being issued to each of said minors for their respective allotments on the 5th day of May, 1907:

For Eva Duncan, the NE¼SE¼ of section 27, and the NW¼SW¼ of section 26, twp. 8 N. of Range 3 E. W. R. M., Wyoming, containing 80 acres; that about 20 acres of said allotment are already in cultivation and under irrigation from a ditch taken out of the South Fork of Mud Creek, above referred to, and produces successful crops of hay, grain and vegetables by irrigation; that an additional acreage of said allotment, the exact amount of which cannot now be stated, may be reclaimed by irrigation; that the waters of said South Fork of Mud Creek are the only source of supply for irrigating said allotment of land and furnishing domestic and stock water supply for said allottee and the use of the waters of said stream on the basis of one cubic foot of water per second of time per 70 acres is reasonably necessary for the ir-

rigation of said land and the successful cultivation of crops thereon.

For Ida Mae Duncan, minor child, the NE¼-NE¼ of Section 33, and the SW¼-SW¼ of Section 27, Twp. 8 II. of Range 3 E. W. R. M., Wyoming, containing 80 acres; that approximately 30 acres of said allotment have been placed in cultivation, producing valuable crops under irrigation through a ditch taken out of South Fork of Mud Creek above referred to, and the water from said stream is the only source of supply for the irrigation of said allotment and the use of water from said stream on the basis of one cubic foot of water per second of time for each 70 acres is reasonably necessary for the successful cultivation of said allotment of land.

For Francis C. Duncan, the SE¼-NW¼ and lot numbered 3 of Section 5, Twp. 8 N. of Range 2, E. W. R. M., Wyoming, containing 80.26 acres, of which allotment 76 acres are irrigable and 55 acres are already under ditch and producing valuable crops, being irrigated through a ditch taken out of Red Creek, a natural stream rising and flowing its entire length within said reservation and discharging its waters into Owl Creek on the northern boundary of said reservation. That the use of the waters of said stream is reasonably necessary for domestic and stock use and for the irrigation of said allotment on the basis of one cubic foot of water per second of time to each 70 acres thereof, in order to cultivate and produce crops on said allotment, and is the only source of water supply for said purpose; that since the death of said Francis C. Duncan, his estate has been in process of administration and under the laws of descent governing the inheritance of Indian lands upon said reservation, the father, mother and surviving brothers and sisters of said decendent named in this bill or complaint will inherit his property.

For Robert L. Duncan, the SW¼-NW¼ and lot numbered 2 of Section 5, Twp. 8, N. of Range 2 E. W. R. M.,

Wyoming, containing 80.22 acres; that 70 acres of this allotment are under irrigation and used in the production of valuable crops irrigated from a ditch taken out of Red Creek, as above described; that the waters of said stream are the only source of supply for domestic and stock use and the irrigation of said allotment, and that the use of one cubic foot of water per second of time of the flow of said stream is reasonably necessary for the irrigation and successful cultivation of crops on said allotment.

For Clyde Duncan, the S¼-SW¼ of Section 34, Twp. 9, N. of Range 2 E. W. R. M., Wyoming, containing 80 acres. All of this allotment is irrigable and 70 acres thereof are now under cultivation and used in the production of valuable crops irrigated through a ditch taken out of Red Creek, as above described; that the waters of said Red Creek are the only source of supply for domestic and stock use and the irrigation of this allotment and the use of one cubic foot of water per second of time from the flow of said stream for each 70 acres thereof is reasonably necessary for the successful cultivation thereof.

For the heirs of Bessie Duncan, deceased, the NE¼-SW¼ and NW¼-SE¼ of Section 34, Twp. 9, N. of Range 2, E. W. R. M., Wyoming, containing 80 acres; that 75 acres of this allotment are irrigable and 65 acres are already under cultivation and used in the production of valuable crops irrigated from a ditch taken out of Red Creek, as above described; that the waters of said stream are the only source of supply for domestic and stock use and for the irrigation of this tract and the use of one cubic foot of water per second of time of the flow of said stream is reasonably necessary for the successful cultivation of said allotment; that the heirs-at-law of said Bessie Duncan, deceased, are, under the rule of inheritance obtaining upon said reservation, the father, mother, brothers and sisters of said decedent named in this bill of complaint.

For William E. Duncan, lot numbered 5 of Section 34 and the SE¼-SE¼ of Section 33, Twp. 9, N. of Range 2, E. W. R. M., Wyoming, containing 79.94 acres. About 40 acres of said allotment are under irrigation and producing valuable crops from a ditch taken out of Red Creek, as above described, which forms the only source of supply of water for domestic and stock use and the irrigation of said allotment; that the use of one-half cubic foot of water per second of time of the flow of said stream is reasonably necessary for the irrigation of said allotment in order to produce crops thereon.

That the volume of water reasonably necessary to be supplied from the South Fork of Mud Creek and from Red Creek respectively for domestic and stock use and for the proper irrigation of the allotments of the above named Indians will exhaust the entire natural flow of both of said streams; that complainant, pursuant to applications made by said allottees and under and pursuant to authority set forth in the General Indian Allotment Act of 1887, has authorized the diversion of water from said streams by said allottees, and through its proper agencies maintains a supervision of said lands, ditches, headgates and waterrights so used by said Indian allottees; that the rights, privileges and obligations required and assumed by complainant and the said tribe of Indians by the treaty creating said reservation, have at all times since the ratification of said treaty and the establishment of said reservation by executive proclamation, remained in full force and effect, and complainant has at all of the times herein mentioned been in possession and control of the lands included in the said Indian allotments and the ditches, headgates and other irrigation works constructed for the irrigation thereof and appurtenant thereto.

III.

That notwithstanding the fact that the lands, ditches and water rights of the Indian allottees named in this bill are within the absolute and exclusive jurisdiction of

complainant, the defendant, Albert Hampleman, claiming to act as an officer of the state of Wyoming, wrongfully and without warrant of law came upon the lands of said Indian allottees, Annie Duncan, Ida Mae Duncan and Eva Duncan, as hereinbefore described, during the season of 1911, and closed the headgates of their ditches taken out of the South Fork of Mud Creek on said reservation, and did by so closing said headgates, cause the natural flow of said stream to be retained in the channel thereof and to be discharged in the channel of Owl Creek, and did thereby deprive said Indian Allottees of the use of the waters of said South Fork of Mud Creek, and did thereby cause said allottees to suffer the loss of their second cutting of alfalfa hay upon their respective allotments, growing on about an area of 100 acres thereof, for want of water for the necessary irrigation of said hay lands, which cutting or crop of alfalfa, had it not been for the interference and trespass of defendant in shutting off irrigation headgates as aforesaid, would have been irrigated by said allottees and harvested and of the value of $500.00: that during the irrigation season of 1912, the said Albert Hampleman, defendant, claiming to act as an officer of the State of Wyoming, wilfully and without warrant of law again closed all of the headgates of the irrigation ditches maintained by said allottees on Red Creek and the South Fork of Mud Creek respectively, thus causing the complete natural flow of said streams to flow down the channels thereof into Owl Creek, which said wrongful closing and shutting down of the headgates as aforesaid caused the said allottees to be deprived of the use of the waters of said streams, and did cause them great loss and damage, to wit: a crop of about 40 acres of oats and about 40 acres of alfalfa growing on their said allotments, the exact amount of which loss complainant is unable to state in dollars and cents; that the said defendant, Albert Hampleman, during the irrigation seasons of 1911 and 1912 continuously persisted in his interference with the headgates of said ditches on

said Indian allotments situated on the South Fork of Mud Creek and upon Red Creek within said reservation, and deprived said allottees of the use of the waters of said streams for the irrigation of their crops until the close of the irrigation season of 1912, and the said defendant, Albert Hampleman, claiming to act as an officer of the state of Wyoming, wrongfully and without warrant of law, has threatened to again shut the headgates of said ditches constructed for the irrigation of said allotted lands, and to exercise control and supervision of the same, and to govern and distribute the waters of said streams, and complainant believes and therefore alleges the fact to be that said defendant intends to and will continue so to interfere with, harass and annoy its said Indian allottees and close the headgates of their ditches from time to time, and to deprive them of the water of said streams reasonably necessary for the irrigation of their said lands, and to which water they are lawfully and justly entitled, and which water of said streams is essential and necessary for their use in the irrigation of their lands on said reservation, to the great and irreparable damage and injury of complainant and its Indian wards and allottees named as aforesaid, unless said defendant is restrained and enjoined from so doing by the order and decree of this court; that the acts and doings of said defendant herein complained of were and are without the license, consent or approval of your complainant, and without the license, consent or approval of the Secretary of the Interior of the United States; that plaintiff has no plain, speedy and adequate remedy at law, and unless defendant is restrained and enjoined from in any manner trespassing upon and interfering with the said lands, ditches and headgates, complainant and its Indian wards will suffer great and irreparable injury; that said acts of trespass in closing the headgates of ditches constructed and used for the irrigation of said lands have been of a continuous character, and the threats and intentions of defendant with reference thereto indicate that such acts of trespass

will be of a continuous character in the future; that said continued acts of trespass heretofore committed and acts of trespass on the part of defendant threatened and intended to be committed in the future will tend to alter the character of the property of said Indian allottees and occasion irreparable loss and damage, if not a total destruction of the value of said allotments for agricultural purposes unless said unlawful and unwarranted acts of trespass be restrained by order of this court.

WHEREFORE, complainant prays that the defendant, his agents, servants and employees, be enjoined during the pendency of this suit from trespassing upon or in any manner interfering with the lands, ditches and headgates of said Indian allottees; that on the final hearing of this case the defendant, his agents, servants and employees be perpetually enjoined from committing any trespass upon, and from in any manner impeding, obstructing or preventing the waters of South Fork of Mud Creek and of Red Creek from flowing from their natural channels to the headgates of said Indian allottees named in this bill, and from in any manner interfering with the headgates of said Indian allottees situate on either of said streams, and from in any manner interfering with or preventing the use by said Indian allottees of an amount of water from said streams reasonably necessary for the irrigation of their said allotments on the basis of the cubic foot of water per second of time for each 70 acres of irrigable land on said allotments, and that complainant have such other, further and general relief as may be in accordance with equity and good conscience.

/s/ Hilliard S. Ridgely
HILLIARD S. RIDGELY
United States Attorney
and Solicitor for Plaintiff.

UNITED STATES OF AMERICA)
) ss.
DISTRICT OF WYOMING.)

HILLIARD S. RIDGELY, being first duly sworn, deposes and says: that he is the regularly appointed, qualified and acting United States Attorney in and for the district of Wyoming: that he has read the foregoing bill of complaint, knows the contents thereof, and that the matters and facts therein stated are true to the best of his knowledge, information and belief.

/s/ Hilliard S. Ridgely

Subscribed and sworn to before this 5th day of September, A.D. 1913.

/s/ _____ _____
Clerk United States District Court, District of Wyoming.

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF WYOMING

No. 753

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALBERT HAMPLEMAN,
Defendant.

DECREE

Now on this day the above entitled cause coming on to be heard, the plaintiff appearing by DAVID J. HOWELL, Assistant United States Attorney for the District of Wyoming, and the defendant, *ALBERT HAMPLEMAN*, appearing by his attorneys, DOUGLAS A. PRESTON, Attorney General for the State of Wyoming, and WILFRID O'LEARY, Deputy Attorney General for the State of Wyoming, and a stipulation by and between the parties hereto having heretofore been filed admitting certain of the allegations contained in plaintiff's bill of complaint, and the Court having heard the testimony of the witnesses produced by said plaintiff, and the arguments of counsel, and being fully advised in the premises, doth find for the plaintiff, and against the defendant, generally, and that the lands, ditches and water rights of the Indian allottees named in plaintiff's bill of complaint are within the absolute and exclusive jurisdiction of plaintiff.

IT IS THEREFORE CONSIDERED, ORDERED AND DECREED, that the defendant, ALBERT HAMPLEMAN, his servants, agents and employees, be, and they are hereby perpetually enjoined from hereafter committing any trespass upon, or from in any manner impeding, obstructing or preventing the waters of South Fork of Mud Creek and of Red Creek from flowing down their natural channels to the headgates of the said Indian allottees named in plaintiff's bill of complaint, and from in any manner interfering with the headgates of said Indian allottees situate on either of said streams, and from in any manner interfering with or preventing the use by said Indian allottees of an amount of water from said streams reasonably necessary for the irrigation of their said allotments on the basis of one cubic foot of water per second of time for each seventy (70) acres of irrigable land on said allotments.

IT IS FURTHER ORDERED that the defendant herein shall pay the costs of this action, to be taxed.

Dated this 26th day of June, A.D. 1916.

/s/ John R. Rivers
Judge

APPENDIX C

IN THE DISTRICT COURT
FIFTH JUDICIAL DISTRICT

STATE OF WYOMING)
) ss.
COUNTY OF WASHAKIE)

Civil No. 4993

IN RE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE BIG HORN RIVER SYSTEM AND ALL OTHER SOURCES, STATE OF WYOMING

ORDER ON PRE-TRIAL CONFERENCE AND ORDER ON MOTIONS

On October 23, 1980 a Pre-Trial Conference was heard in the above-entitled matter. Counsel was present for the United States, the State of Wyoming, the Shoshone and Arapahoe Tribes, and several individual Defendants.

This Order shall govern the trial set to begin December 1, 1980, concerning the reserved water rights pertinent to the Wind River Indian Reservation and reflects the positions taken by counsel and the rulings made by the Special Master at the Pre-Trial Conference.

1. *Jurisdiction and Parties.* The Court has ruled this action to be a general stream adjudication. The United States, supported by the Shoshone and Arapahoe Tribes as *amicus curiae*, objected to the jurisdiction of the Court and preserved that objection. The Tribes have intervened but preserve all objections to the jurisdiction of the Court.

2. *General Nature of the Claims of the Parties.* The United States, essentially realigned as Plaintiff, asserts

water rights for the Wind River Indian Reservation. The Tribes, similarly realigned as Plaintiffs, join in that claim but seek a larger quantification than does the United States. The Tribes also assert a reserved right for lands held in fee by tribal members and their descendants and for land that may be reacquired by the Tribes. The Tribes also seek an open-ended decree to provide for unforeseeable future needs. The State of Wyoming, essentially realigned as a Defendant, and some of the Defendants, other than the United States and the Tribes, contest these claims on both factual and legal bases as set forth in their respective Pre-Trial Statements. Those Pre-Trial Statements, including those filed for the September, 1979 Pre-Trial Conference, are incorporated herein by reference.

3. *Uncontroverted Facts.* The only uncontroverted fact is the exterior boundaries of the Wind River Indian Reservation, which has been stipulated to by the United States, The Tribes and the State. All other issues of fact are controverted.

4. *Contested issues of Fact.* The following are the contested issues of fact concerning the measurement of the reserved water rights for the reservation. There is at this time no agreement among counsel for the major parties on any of this anticipated evidence:

A. The purposes for which the lands comprising the Wind River Indian Reservation were withdrawn.

B. Whether Congress intended to reserve any water rights on behalf of the Wind River Indian Reservation. (Wyoming's presentation at trial concerning this issue is hereby limited to a narrative offer of proof not to exceed a thirty-minute oral presentation with supporting documents).

C. The number of practicably irrigable acres on the Wind River Indian Reservation.

D. The injury to any State-awarded appropriative water rights resulting from the exercise of Federal reserved rights, if the Master finds any such reserved rights to exist.

5. *Contested Issues of Law.*

A. Whether the United States and the Tribes, in the creation of the Wind River Reservation, reserved water rights for the benefit of the Tribes.

B. If reserved water rights were created in Wyoming, whether the reserved rights doctrine delineates the strict boundaries of those rights.

C. What is the proper measure for those reserved water rights?

D. Whether the equal-footing doctrine dictates that, by admitting Wyoming into the union on an equal footing with the original thirteen states, the United States did not intend to reserve any water in the State of Wyoming. (Wyoming's presentation at trial concerning this issue is hereby limited to a narrative offer of proof not to exceed a thirty-minute oral presentation with supporting documents).

E. Whether the United States is estopped from claiming any reserved water rights in Division No. 3.

F. Whether the water rights must be quantified once and for all or whether the decree should be left open-ended.

G. What the parameters are of any reserved water right that might have been created in Wyoming, including but not limited to:

(i) Whether the amount reserved is the quantity of water which is absolutely necessary to prevent the purposes of the reservation from being entirely defeated; or

(ii) Whether any reserved water rights which may be found by the Special Master to exist on behalf of the Wind River Indian Reservation are limited in quantity to the amount necessary to fulfill the agrarian purpose for which the reservation was created; or

(iii) Whether the quantity of water reserved for the Wind River Indian Reservation, if any, is the amount of water sufficient to irrigate all the practicably irrigable acreage on the reservation and for related domestic and stock-watering uses only; or

(iv) Whether reserved water rights arise only in connection with a Federal reservation of land and may be used only within the boundaries of the land with which it is associated.

H. What is the quantity of any reserved water rights that may have been created?

I. Whether the waters, once a measurement has been established, may be used for other purposes, and if so, must this be limited so that an increased burden is not placed on the water source.

J. What are the priority dates of any reserved water rights which might be found to exist by the Special Master, in connection with lands continuously held by the Tribes, lands ceded away but later restored to the Tribes, and lands sold to non-Indians but later reacquired by or restored to the Tribes.

K. Whether the Tribes' reserved water rights include water for lands held in fee by tribal members or direct descendants of tribal members.

L. Whether the Tribes' reserved water rights include water for land currently owned in fee by non-Indians which the Tribes expect to reacquire in the future.

M. What are the geographical limits on the use of any reserved water rights that might be found to exist?

N. Whether a reserved water right is terminated when it is leased, permitted, licensed or otherwise disposed of to a non-Federal entity or used for the achievement of goals separate from those for which the right was originally reserved.

O. Whether reserved rights apply to groundwater.

P. The proper date, not before 1905, to be used in determining practicability of irrigation; Wyoming's presentation concerning irrigation technology as of any earlier date shall be limited to an offer of proof with supporting documents.

Q. Whether any reserved rights which might be found to exist by the Special Master are junior to water rights issued by Wyoming which predate the creation of the reserved right.

6. *Special Master's Rulings on Certain Contested Issues of Law and Trial Procedure.* There has already been a trial before the Master, extensive briefing, and arguments on the boundaries of the reservation, the existence of reserved water rights on the reservation, the purpose of the establishment of the reservation in 1868, the effect of the opening or cession of a portion of the reservation in 1905, and the dates of priority of various claimed water rights on the reservation. In proposed pre-trial statements and at the Pre-Trial Conference, various issues were raised, objected to and argued, and as a resolution of those issues the following rulings are now made in regard to the subject matter of the evidentiary trial to begin on December 1, 1980.

A. It is the Master's duty to determine the "nature, extent, and relative priority of the water rights of all persons in the river system." The State has asked the Master to decree that "any reserved water rights awarded by this litigation to the United States must be administered by the Wyoming State Engineer." The question of who shall administer the water rights goes beyond the

reference made by the Court to the Master and will not be determined by the Master. Thus, evidence or arguments relevant only to the question of administration of the water rights will be excluded at trial.

B. Each and every individual Defendant shall retain the right to assert, at the proper time, all affirmative defenses asserted by any party to the captioned matter.

C. The United States and the Tribes argued that evidence on the impact of tribal water rights on non-Indians is both irrelevant under Supreme Court decisions and prejudicial. The Master ruled that the tribal water rights should not be determined by its impact on later acquired rights and that extended testimony on impact would be prejudicial. However, the individual Defendants shall be entitled to present their case in chief, which portion of said trial shall commence at the close of the State of Wyoming's case in chief. Not more than two days direct testimony will be allowed to the State and individual Defendants to present testimony regarding the impact of tribal water rights on non-Indians so long as such testimony is not repetitive or oppressive. The trial will convene in Worland, Wyoming and the Master desires that the individual Defendants and their counsel attempt to present testimony that is truly representative of the impact of the Indian claims on the use of their water rights.

D. The right of any individual Defendant to present evidence relating to and to prove the elements of any affirmative defense asserted in the captioned matter is preserved until such time as all of the claims of the United States and the Indian Tribes have been fully determined. The presentation of evidence relating to any such affirmative defense shall be heard at the same time the Master hears any challenges to individual water rights pursuant to the Order of June 26, 1980 and the stipulation contained therein.

7. *Exhibits.* The parties, by mutual agreement, will submit copies of their exhibits to counsel for the major parties at least (10) days before the commencement of

trial, unless otherwise agreed, or persuasive reasons are shown for inability to present exhibits within the ten-day rule.

8. *Depositions.* Any party proposing to offer all or any portion of a deposition shall notify opposing counsel at least ten (10) days before trial of the offers to be made (unless the necessity of using the deposition develops unavoidably thereafter). If objection is to be made, or if additional portions of the deposition are to be requested, opposing counsel will notify offering counsel at least five (5) days before trial of such objections or requests. If any differences cannot be resolved, the Master must be notified in writing of such differences at least three (3) days before trial.

9. *Discovery.* Discovery is ongoing at the present time. Depositions currently scheduled to be taken by attorneys for the State of Wyoming of certain experts working on behalf of the United States and the Tribes, which depositions are scheduled as per an agreement between these parties for the week of November 17, 1980, shall be taken pursuant to that agreement. Any such expert not available for deposition prior to trial shall not be allowed to present testimony at trial. All other oral depositions shall be concluded no later than November 21, 1980.

10. *Witnesses.* At least ten (10) days before the trial commences all parties shall submit to opposing counsel and to the Master the names, addresses, and general subject matter of testimony of any and all witnesses that will or may be called by the party to testify. This restriction shall apply to rebuttal witnesses, unless the necessity of their testimony reasonably cannot be anticipated within the ten-day rule.

11. *Other Matters.*

A. Local counsel representing private appropriators are not precluded from participating in the trial by their non-attendance at the Pre-Trial Conference. However, should they choose to call witnesses other than those

designated by the State of Wyoming, the names, addresses, and a summary of the witness' testimony must be provided to all opposing counsel and the Master at least ten (10) days prior to trial.

B. The United States and the Tribes shall each present their entire case in chief followed by the entire case in chief of the State of Wyoming and any private parties contesting the tribal claims and complying with the requirements of this Order.

12. *Settlement Possibilities.* Settlement has been discussed by the parties, but the prospects at this time are unknown.

13. *Ruling on Motions from October 23 Pre-Trial Conference.*

A. Upon agreement of the United States to waive the 10-day rule, there came before the Special Master Wyoming's Motion for Partial Summary Judgment on In-Stream Flow Claims made on behalf of the BLM. Based upon briefs submitted and oral argument made, IT IS HEREBY ORDERED that the State of Wyoming's Motion for Partial Summary Judgment is hereby denied.

B. There also came before the Special Master Wyoming's Motion to Strike the testimony of Michael O'Grady and portions of the testimony of Ronald Billstein. Based upon briefs submitted and oral arguments made, IT IS HEREBY ORDERED that Wyoming's Motion to Strike the testimony of Michael O'Grady and portions of the testimony of Ronald Billstein is hereby denied.

DATED this 10th day of November, 1980.

/s/ Teno Roncalio
TENO RONCALIO
Special Master

cc: All Attorneys of Record
and Pro Se Defendants

No. 88-309 (9)

Supreme Court, U.S.
FILED
MAR 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

STATE OF WYOMING
Petitioner,

v.

UNITED STATES OF AMERICA, SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

AMICI CURIAE BRIEF OF THE COUNTY OF CHAVES, THE COUNTY OF LINCOLN, THE CITY OF ROSWELL, THE VILLAGE OF RUIDOSO DOWNS, AND TWENTY-TWO COMMUNITY ACEQUIAS, ALL WITHIN THE STATE OF NEW MEXICO

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March 9, 1989

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30 pp
4 foldouts

Community acequias or community ditches are bodies corporate, statutorily designated as political subdivisions of the State of New Mexico, organized to administer and govern the distribution of surface water. *See* §§ 73-2-11 and 73-2-28 N.M.S.A. (1985 Repl.). The additional *amici curiae* are:

Rio Bonito

- Government Springs Ditch
- Providencia Ditch
- Cruz de Jara Ditch
- Lincoln Ditch

Rio Ruidoso

- Hale Ditch South
- Bracken Ditch
- Hewett Ditch
- Barragan & West Ditch
- Ambrocio Chavez Ditch #1
- Lower Chosas Ditch
- Acequia de Mes
- Ambrocio Chavez Ditch (lower)
- F. Sanchez Ditch #2
- Hale Ditch North
- Maxwell Ditch
- L. Gallegos Ditch
- Analla & Barragan Ditch
- Chosas Ditch South
- San Patricio Ditch
- Storm Ditch
- Pablo Chavez Ditch

Rio Hondo

- Picacho Ditch

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QUESTION PRESENTED

In the absence of any demonstrated necessity for additional water to fulfill reservation purposes and in the presence of substantial state water rights long in use on the reservation, may a reserved water right be implied for all practicably irrigable lands within a reservation set aside for a specific tribe?

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No. 88-309

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INTEREST OF AMICI CURIAE

The *amici curiae* are essentially all of the counties, municipalities, and community acequias involved in *State of New Mexico ex rel. S. E. Reynolds v. Lewis*, Chaves County Nos. 20294 and 22600, Consolidated, a statutory water rights adjudication of the interrelated rights to the use of the waters of the Rio Hondo, the Rio Ruidoso, and the Rio Bonito in southeastern New Mexico. Along with approximately 600 individual water users in the stream system, the *amici* are parties defendant whose water rights will be determined *inter sese*, as against the federal reserved rights of the United States on behalf of the Mescalero Apache Tribe. The *amici* and their defendant constituents, as opposed to

the State of New Mexico, are the real parties in interest in *Lewis*.[1]

The property rights of the *amici curiae* will necessarily be affected by the Court's resolution of the question presented because the Court will settle the underlying issues of the applicability of practicably irrigable acreage as a standard of quantification and the conflict between the intent to imply a federal reserved water right in the face of express congressional or executive action to the contrary. With respect to both issues, the *amici curiae* support the State of Wyoming.[2]

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[1]The State of New Mexico prosecutes statutory adjudications in its governmental capacity, usually as the party plaintiff, to facilitate the administration of water rights. *See* §§ 72-4-15, *et seq.* N.M.S.A. (1985 Repl.). The state does not represent the interests of the water users *parens patriae*, but is normally postured as an adversary. *Cf.* Brief of the State of New Mexico as Amicus Curiae, at 2, n.1.

[2]Notwithstanding analogous facts and the court's conclusion in *Lewis* that "[w]hen there is an expressed intent to exclude land and appurtenant water from a reservation a contrary intent cannot be implied," the State of New Mexico does not treat the conflict between expressed and implied intent in its brief as *amicus curiae*. *Cf.* Brief for the Petitioner at 17-21.

With respect to the first issue, the State of Wyoming notes that:

> [T]he Indians inevitably will point out that the primary agricultural purpose of the reservation is now outmoded, *i.e.*, that it may be impossible to generate a moderate living for its Indian residents based solely on agriculture.

Brief for the Petitioner at 16. Wyoming concludes that "relief from [this] situation is appropriately sought from the Congress or the Executive, whichever established the reservations for agricultural purposes." *Id.* at 49. The State of New Mexico however, urges that the Court take it upon itself to quantify federal reserved rights based on modern day purposes instead of the purposes for which a reservation was withdrawn. *See* Brief of the State of New Mexico as Amicus Curiae at 11. Contrary to Rule 36.2, New Mexico does not identify the party it supports as *amicus curiae*.

SUMMARY OF ARGUMENT

The standard of practicably irrigable acreage used to quantify federal reserved water rights for Indians has been equated with the economic feasibility of a proposed Indian irrigation project. As such, the "proof" of an Indian right in recent cases has consisted of a benefit-cost analysis of a given proposed project. Benefit-cost analysis is the public sector counterpart to the financial feasibility tests customarily performed by private sector investors prior to undertaking long-term capital investments. The function of benefit-cost analysis is to assess the social return on public expenditures.

In recent litigation over federal reserved rights, benefit-cost analysis has been taken out of context and used as a device to justify competing entitlements to property, *i.e.*, water rights. When used as a tool of advocacy, benefit-cost analysis becomes contrived. Typically, the United States manufactures idealized projects and skews each of the elements of the analysis in order to arrive at a favorable benefit-cost ratio. It is common knowledge that these projects will never be constructed. As a consequence, they represent nothing more than a pretext to create large paper water rights as a form of wealth. The object is to sell or lease the rights, which belies any implicit need for water to satisfy the purposes for which an agricultural reservation was withdrawn from the public domain.

Additionally, the Winters Doctrine is a doctrine of contemporaneous intent and implicit need. The doctrine insures that the purposes for which federal lands are reserved will not fail absent an explicit reservation of necessary water. While the historic facts surrounding the withdrawal of lands from the public domain for the creation of Indian reservations may differ, it is not logically possible to imply a need for a federal reserved right in the face of an express intention to the contrary.

ARGUMENT

POINT I: PRACTICABLY IRRIGABLE ACREAGE OR BENEFIT-COST ANALYSIS HAS PROVEN TO BE UNSUITED TO THE ESTABLISHMENT OF A PROPERTY RIGHT THROUGH LITIGATION

The standard of practicably irrigable acreage was promulgated in *Arizona v. California*, 373 U.S. 546 (1963). The Court's Special Master concluded that the United States intended to reserve Colorado River water for five Indian reservations when the reservation lands were withdrawn from the public domain. Report of Special Master Simon H. Rifkind at 259-260, December 5, 1960. The Master concluded that the reservation of water "was not limited to the needs of the population then resident upon the land, nor to the acreage being irrigated when the reservation was created," but that "enough water was reserved to satisfy the future expanding agricultural and related water needs of each Indian reservation." *Id.* at 260.

The Special Master settled on the standard of practicably irrigable acreage to quantify the Indians' water rights:

> I have concluded that the United States effectuated the intention to provide for the future needs of the Indians by reserving sufficient water to irrigate all of the practicably irrigable lands in a reservation and to supply related stock and domestic uses.

Id. at 262. The standard served the objectives of enabling the quantification of the rights notwithstanding population growth and of establishing water rights of fixed magnitude and priority to provide certainty for all water users. *Id.* at 265.

When *Arizona v. California* was reopened, the Master pointed out that "no standard [of quantification] is definitive for all cases" and that practicably irrigable acreage has not been adopted as "the universal measure of Indian reserved water rights . . .." Report of Special Master Elbert

Tuttle at 87-90, February 22, 1982. Nonetheless, the Court understandably refused to relitigate its previous adoption of the standard in order to preserve the certainty established in 1963 with respect to the Colorado River Indians.[3] *Arizona v. California*, 460 U.S. 605, 625 (1983).

The standard of practicably irrigable acreage has been equated with the economic feasibility of proposed agricultural projects for Indians. Report of Special Master, February 22, 1982, *Arizona v. California*, 460 U.S. 605 (1983). The Master concluded that "a finding that annual benefits exceed costs will suffice for a finding of practicable irrigability." *Id.* at 100. *See e.g., Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981); *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), *cert. denied, Oregon v. United States*, 467 U.S. 1252 (1984). Accordingly, the "proof" of a reserved right for an Indian reservation withdrawn for agricultural purposes usually consists of a benefit-cost analysis of one or more proposed irrigation projects.

The current confusion over the quantification of reserved rights for agricultural reservations comes from two sources, *viz.*, the Court's holding that federal reserved water rights are limited to need in *Cappaert v. United States*, 426 U.S. 128,

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[3]On the basis of practicably irrigable acreage, the Master recommended, and the Court adopted, an award of 905,496 acre feet annually to the five Colorado River reservations having a combined population of 2,940 Indians. *See* Report of Special Master Simon H. Rifkind at 350-51 and 85-88. According to the United States Census, the estimated contemporaneous population of the Colorado River Basin states — Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming — was 23,658,000 people. 1960 Census Population, Vol. I, Part 1, Estimates of Total Resident Population of States and Puerto Rico, July 1, 1963, Table 1.

The remainder of the average annual flow of the Colorado River of 13,500,000 acre feet, *i.e.*, 12,594,504 acre feet, was apportioned to the basin states. On a per capita basis, the use of practicably irrigable acreage as the standard of quantification was 579 times more favorable to the Indians than the nonIndians. Today, the ratio is much more exaggerated.

See Appendix A for the potential application of the standard.

142 (1976) and *United States v. New Mexico*, 438 U.S. 696, 700-702 (1978), and the consternation of Interior and Justice Department attorneys over the prospect that reserved water rights were not as broad and unlimited as had been hoped.[4] The result has been an attempt to distinguish between Indian reserved rights and nonIndian reserved rights, coupled with the attribution of the doctrinal limitations only to the latter. At the same time, the Indian advocates began to assert that the purpose of any Indian reservation was to create "a permanent homeland," a concept designed to overcome the limitation to a need to satisfy the specific purposes of a given reservation.[5]

Since *Cappaert* and *New Mexico* in 1976 and 1978, the Indian reaction to the Court's continuing and consistent definition of the reservation doctrine has also led to a change in the manner in which the United States approaches the proof of economic feasibility. When the Court adopted benefit-cost analysis as a standard of quantification in 1963, it did so on the basis of traditional methodological precepts. Since then the United States has altered the economic approach that was used in 1963 by adjusting

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[4]The holdings in *Cappaert* and *New Mexico* do not differ from the Court's conclusion in *Winters v. United States*, 207 U.S. 564 (1908). There, the Ft. Belknap Reservation was awarded the water needed to irrigate the existing 5,000 acre Indian irrigation project that precipitated the lawsuit. The Ninth Circuit noted that the Ft. Belknap Reservation had approximately 30,000 practicably irrigable acres. 143 Fed. 740 (9th Cir. 1906). The change came in *Arizona v. California* in 1963.

[5]While not disputing that an Indian reservation may have been created as a permanent homeland, albeit that the contemporaneous policy was one of assimilation, such a concept is not useful to explicate the object to be attained in reserving water for a particular purpose. Under the Winters Doctrine, in other words, the purposes must be specific enough to determine by rational inference a certain need for water. Otherwise, the doctrine is nothing more than a black hole in the 5th Amendment, *i.e.*, a legal fiction designed to facilitate taking without compensation. *See* Brief for the State of New Mexico, *United States v. New Mexico*, No. 77-510 at 10-18.

benefit-cost analysis with a social and ethical bias deemed necessary to compensate for the government's past injustices to Indians.[6] The result in litigation has been more than the assertion of unorthodox benefit-cost analyses by the United States and the tribes. The benefit-cost analyses have become charades to procreate excessive and unnecessary water rights. While continuing to articulate their claims in the vernacular of benefit-cost analysis, the United States and the Indians have invalidated the concept of practicably irrigable acreage by thoroughly distorting its analytic elements.

With the increase in Indian water right litigation, benefit-cost analysis has gradually become a means to justify the end, namely to make an idealized project economically feasible in order to maximize the potential entitlement to water. The analysis, however, was never intended to be utilized in resolving competing entitlements to property or water rights. When used as a tool to advocate a legal theory, particularly when championing Indian water rights, benfit-cost analysis is transformed from an objective analytical tool to a self-serving and purely argumentative form of assessment. The result is that the United States maintains that Indians should get special treatment in a benefit-cost analysis of any of its proposed water projects. For example, the United States and the tribes typically claim the benefits from products moved off the reservation in a local region, but refuse to consider the costs that accrue beyond the reservation boundary. Similarly, instead of considering a reasonable discount or interest rate, the United States and

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[6]The witnesses used by the United States, who appear on the same side in adjudications all over the West, admit that they modify their benefit-cost analyses with social considerations in order to produce a favorable benefit-cost ratio in circumstances where the project in question would be patently infeasible if it were being contemplated for nonIndian use. *See, e.g.*, H. S. Burness, R. G. Cummings, W. D. Gorman, and R. R. Lansford, "Practicably Irrigable Acreage and Economic Feasibility: The Role of Time, Ethics, and Discounting," 23 Nat. Res. J. 289 (1983).

the tribes believe that they are entitled to rely on an unquestionably low cost of money. Knowing that the projects will never be constructed, however, it is only the language — and not the substance — of benefit-cost analysis that is useful to the Indians.

No special rules should apply to the economic feasibility of a proposed Indian project. For any public investment, all beneficiaries and all adversely affected parties should have their interests represented and measured in economic terms. The purpose of benefit-cost analysis is to calculate all benefits and costs and compute the ratio between the two, not to maximize the present value of net benefit by giving special treatment to one group of people.

The use of benefit-cost analysis as "proof" of a reserved water right has also led to the manufacture of Indian claims in the Justice Department with little or no input from the Indian tribes. The purpose is to create an artifice through which to maximize the water "needed" for the reservations. Neither the Justice Department attorneys nor the Indians, however, believe that these projects will ever be built. The projects are designed to create a paper water right that can be leased to the nonIndians who, in direct proportion to the extent the Indians perfect their paper rights, would witness the defeasance of their own rights.[7] *Cf. United States v. New Mexico*, 438 U.S. 696, 699, 715 (1978); *see also* Brief for the Petitioner at 32-33. In words attributed to Wendell Chino, the Chairman of the Mescalero Apache Tribe, 'it's about time [the nonIndians] started to pay for our water.'

The fundamental problem with the use of practicably irrigable acreage or benefit-cost analysis to quantify federal reserved rights for Indians was summed up by Dr. Robert

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[7]Contrary to the assertions of the United States and the tribes, the Winters Doctrine does not mean that when the United States reserves land from the public domain for a specific federal purpose, it must have intended to implicitly reserve all of the money needed to satisfy the purposes for which the land was withdrawn.

Young, one of the nation's foremost agricultural economists, in his testimony in the *Lewis* case: When used to create a property right or entitlement to water, especially in fully appropriated stream systems, the analysis will necessarily be biased and distorted. Transcript of Proceedings, December 1, 1987, *State of New Mexico ex rel. S. E. Reynolds v. Lewis et al.*, Chaves County Nos. 20294 and 22600, Consolidated, Vol. III at 1107-1157. He concluded his testimony by stating that while benefit-cost analysis "might have applied to some of the earlier, less difficult cases . . . we need to find some other mechanism for resolving these conflicts." *Id.* at 1157.

POINT II: AN INTENT TO RESERVE A WATER RIGHT CANNOT BE IMPLIED WHEN THE UNITED STATES EXPRESSES AN INTENT TO THE CONTRARY

In this case, President Roosevelt authorized the construction of the Shoshone Reclamation Project just north of the Reservation. A year later, the United States Congress passed legislation enabling the Shoshone to acquire water rights for the irrigation of additional lands under Wyoming law, appropriating funds, and facilitating the development of canals and reservoirs and the improvement of arable lands. Act of March 3, 1905, 33 Stat. 1016. Notwithstanding the expressed intent of Congress to create water rights for the Shoshone under state law, the Wyoming Supreme Court implied an intent to federally reserve a water right to supply approximately 70% of the same reservation lands. *See* Brief for the Petitioner at 5.

A similar conflict between the government's expressed intent and an implied intent appears in the *Lewis* case.[8] With

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[8]In its Summary of Argument, Wyoming states that:

> The question before the court concerns the appropriate standard of quantification of the implied federal reserved water right for agricultural Indian reservations, typically set aside during the nine-

respect to the creation of the Mescalero Apache Reservation, the court found that:

> The first Executive Order of May 29, 1873, withdrew land from the public domain for the purpose of providing arable land and grazing lands for a Mescalero Apache Reservation. When the reservation boundaries wre originally designated in 1873, there was a specific intent on the part of federal officials to protect the agricultural economy and water supply of non-Indian farmers who settled the arable lands among the Rio Ruidoso valleys prior to 1873. In 1873, the Rio Bonito, Rio Hondo and Rio Ruidoso valleys were occupied by settlers. These lands and the appurtenant water appropriated by those settlers were not available for a reservation. In response to these Indian/non-Indian land use conflicts, all of the irrigated lands along Rio Ruidoso were expressly excluded from the 1873 Executive Order reservation.

Decision of the Court, January 25, 1989, Finding No. 7. *See* Appendix B. The court found further that:

> On February 8, 1874, an Executive Order withdrew land from the public domain for the purpose of adding arable land and grazing land to the reservation. All of the arable lands along the Rio Ruidoso were excluded from the reservation by the 1874 Executive Order to protect the agricultural economy and water supply of non-Indian farmers who had settled the arable land along the Rio Ruidoso prior to 1873.

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teenth century, well before significant irrigation water rights were obtained from the states by non-Indian settlers in the West.

Brief for the Petitioner at 11. It should be noted that this was not always true. In *Lewis*, for example, the stream system in question was fully appropriated by nonIndian settlers *before* the Mescalero Reservation was created.

Id., Finding No. 9. *See* Appendix C.[9]

Despite the expressed intent of the government, the United States asserted in *Lewis* that the Mescalero had an implied right to the waters of the Rio Ruidoso to irrigate all of the practicably irrigable acreage for the proposed Rinconada Project, located on the opposite side of Sierra Blanca, a mountain rising to 12,003 feet.[10] Considering the facts in *Lewis*, the Court concluded that "[w]hen there is an expressed intent to exclude land and appurtenant water from a reservation a contrary intent cannot be implied." While it would not seem possible to reason to a different conclusion, the Wyoming Supreme Court has done so in this case.

CONCLUSION

Two conclusions emerge.

First, although litigation over federal reserved water rights has shown that each case has its own character, there is a striking similarity between the Wind River Reservation in Wyoming and the Mescalero Apache Reservation in New Mexico. In both instances, the necessity for a federal reserved water right was eliminated in part. For the Wind River Reservation, Congress expressly provided for state water rights to be obtained for the Indians. For the Mescalero Reservation, non-Indian arable and irrigable lands along the Rio Ruidoso were expressly carved out of the

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[9]The evidence in *Lewis* also showed that the area excluded was widened considerably past the foothills bordering the Ruidoso Valley in order to prevent depradations. *Comp.* Appendix C with Appendix B.

[10]A benefit-cost analysis was done for the proposed project, including a reconnaissance level study of the transmountain diversion facilities, estimated to cost $45,638,250.00. The United States also sought a reserved right for practicably irrigable acreage in the amount of 17,941.7 acre feet annually from any of its proposed points of diversion. The average annual flow of the Rio Ruidoso at the reservation boundary, just above the nonIndian community, is 9,620 acre feet.

withdrawal of public lands, while other sources of supply from which a right could be implied were made a part of the reservation. Though differing historic facts surround the creation of all Indian reservations, it must be remembered that a reserved water right was not necessarily intended in all circumstances. In some instances, there are withdrawals of land from the public domain, such as those for the Mescalero and Wind River reservations, for which history must be rewritten in order for a reserved water right to be created by implication.

Secondly, as long as a practicably irrigable acreage or benefit-cost analysis forms the "proof" of a reserved right for Indians, it will be abused and distorted. When used to assert a property right, the analysis becomes contrived as a matter of course.

Consequently, the Court should adopt a standard of quantification tailored to a demonstration of the needs associated with the contemporaneous purposes for which Indian reservations were created.

Respectfully submitted,

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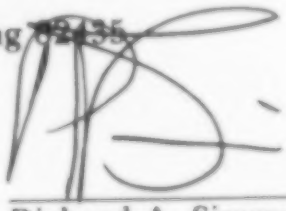

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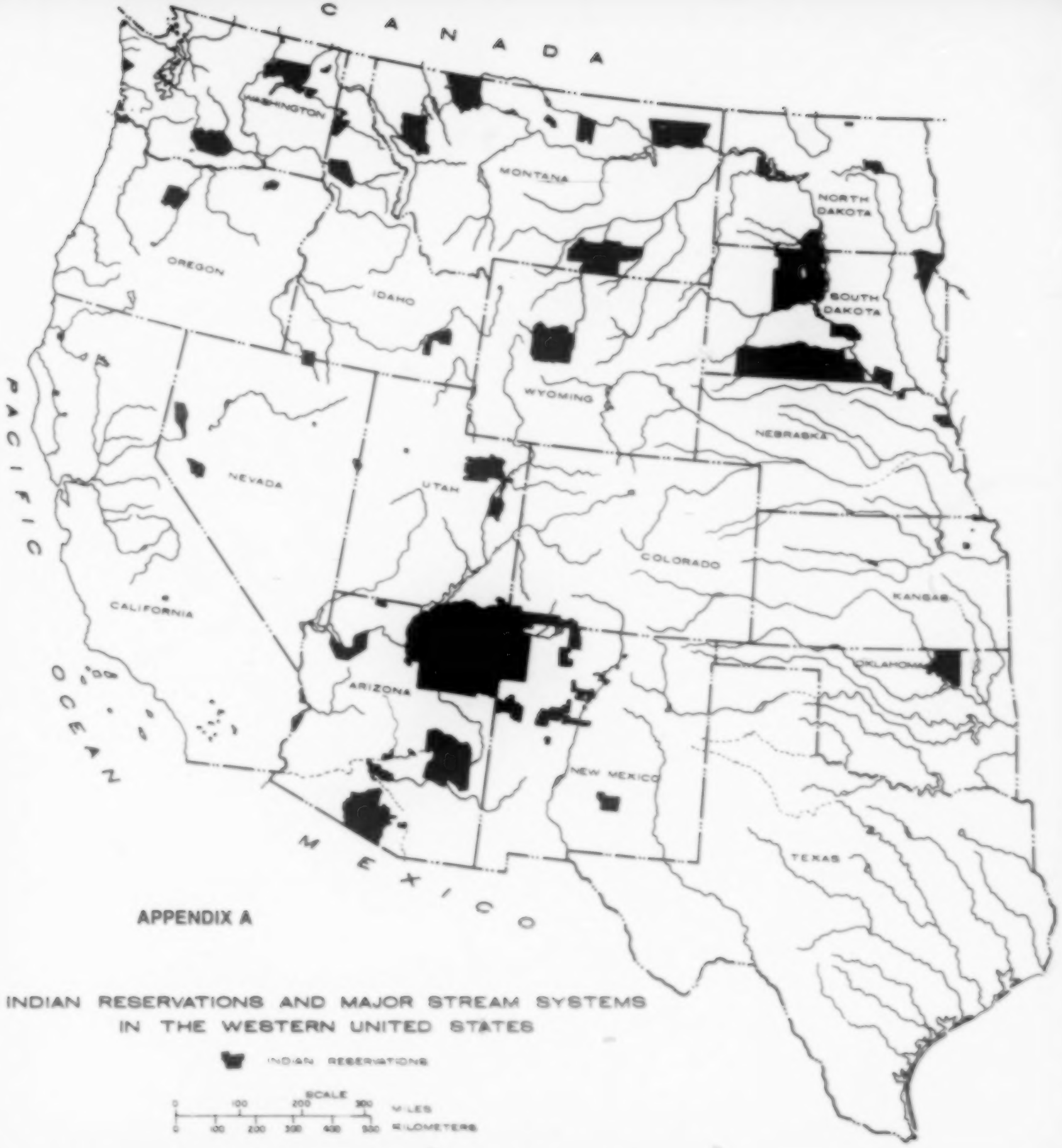
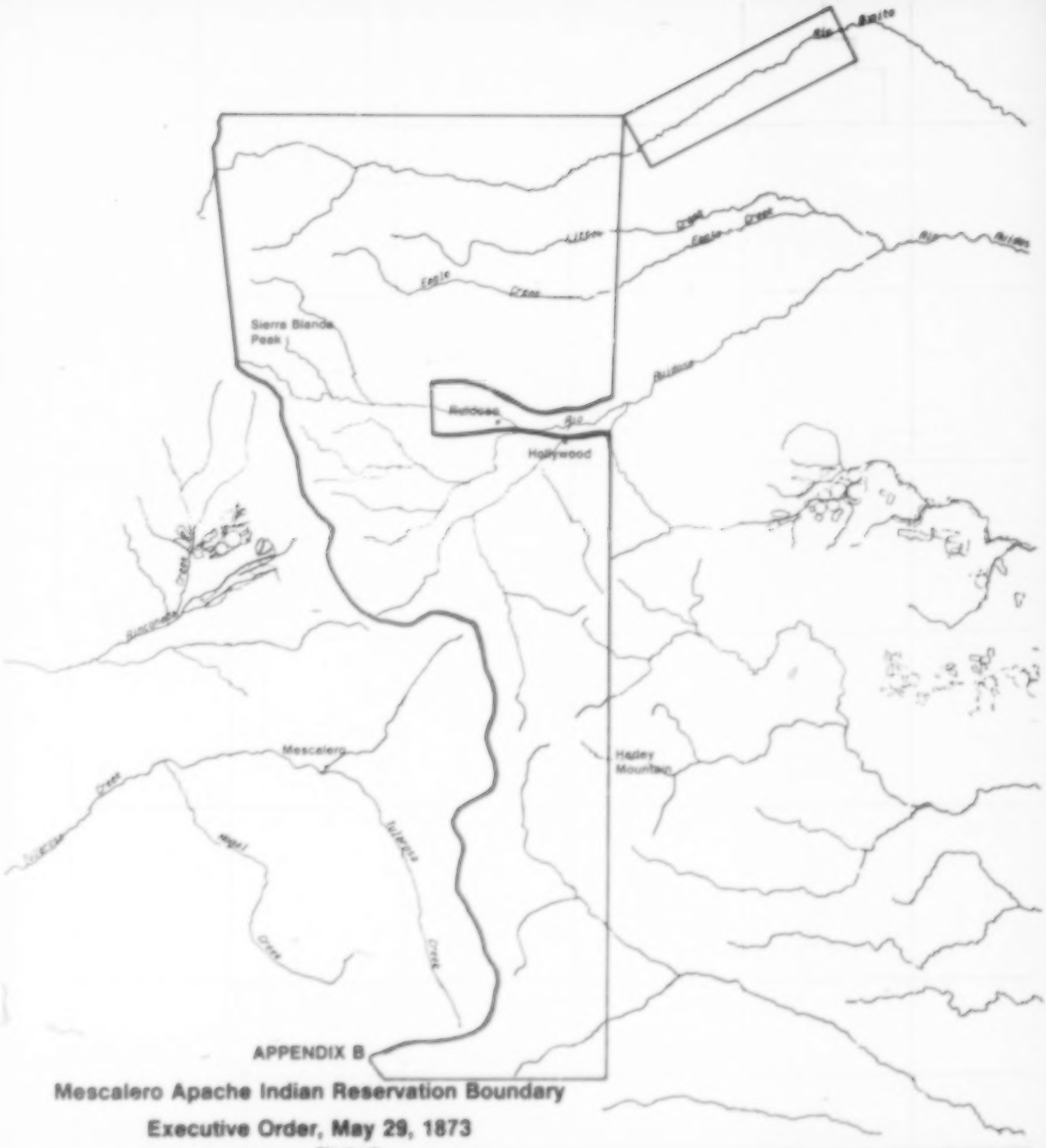


APPENDIX A

INDIAN RESERVATIONS AND MAJOR STREAM SYSTEMS IN THE WESTERN UNITED STATES

Prepared by New Mexico Water Resources Division from National Atlas, Federal Lands (sheet no. 272) compiled by U.S.G.S., 1968.

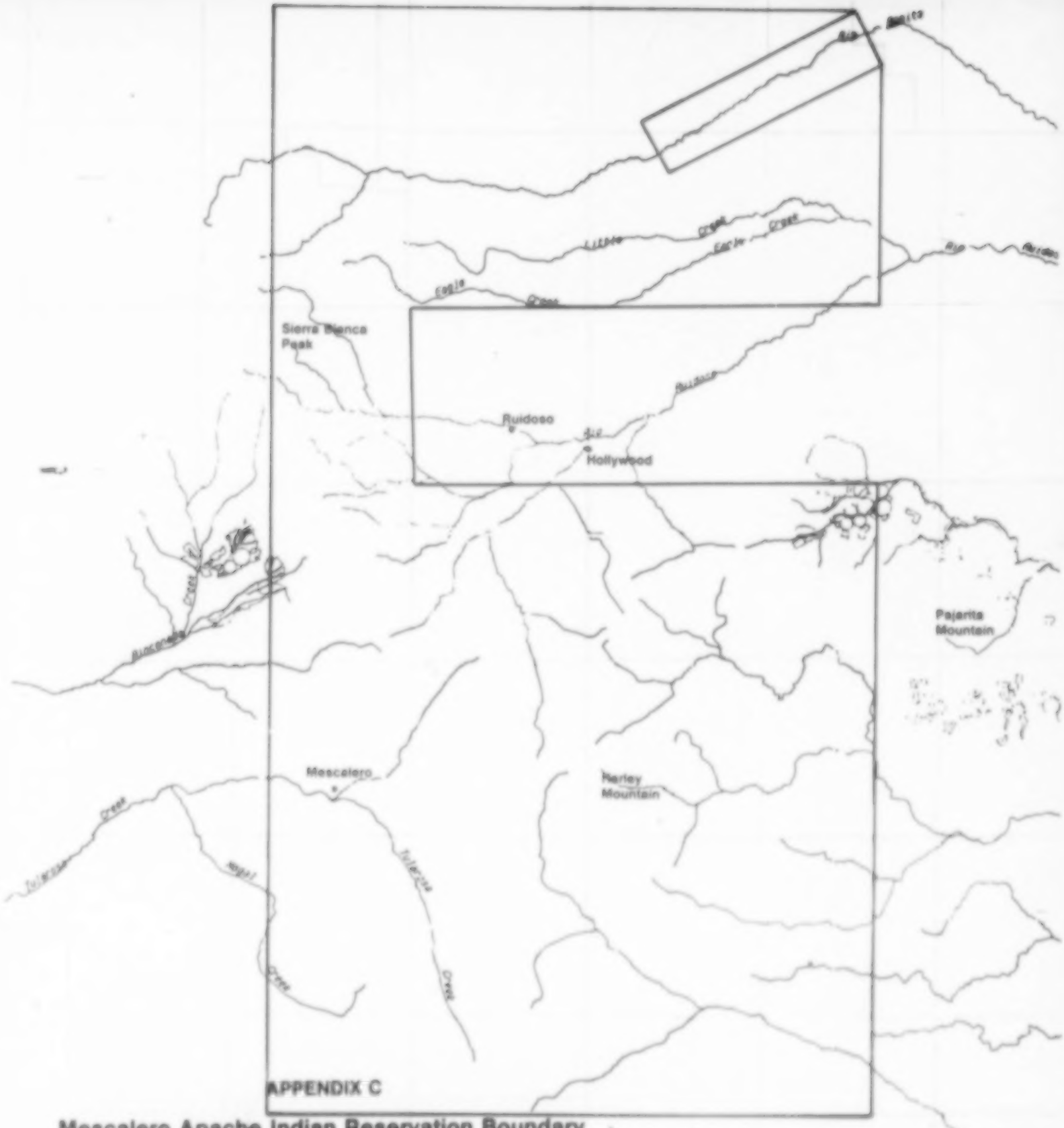


APPENDIX B

Mescalero Apache Indian Reservation Boundary

Executive Order, May 29, 1873

Cloudcroft



APPENDIX C

Mescalero Apache Indian Reservation Boundary

Executive Order, February 8, 1874

Cloudcroft

Supreme Court, U.S.
FILED
MAR 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-309 (10)

IN THE

Supreme Court of the United States

October Term, 1988

STATE OF WYOMING, *Petitioner,*

v.

UNITED STATES OF AMERICA, SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, *et al., Respondents.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

BRIEF OF THE STATE OF NEW MEXICO AS AMICUS CURIAE

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No. 88-309

IN THE

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STATE OF WYOMING, *Petitioner,*

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UNITED STATES OF AMERICA, SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, *et al., Respondents.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

BRIEF OF THE STATE OF NEW MEXICO AS AMICUS CURIAE

The State of New Mexico as amicus curiae respectfully urges that this Court reconsider and reject the standard of "practicably irrigable acreage" (PIA) for the quantification of federal reserved water rights for Indians, and adopt a standard related to actual needs.

INTEREST OF AMICUS

New Mexico is an arid state. The state has ten active stream adjudications involving the water rights of eighteen Indian

Tribes and Pueblos and approximately 20,000 non-Indian claimants.[1] New Mexico is thus deeply interested in the standard according to which those rights will be quantified. One of these adjudications, *State of New Mexico ex rel. Reynolds v. Lewis*, Chaves County Nos. 20294, 22600, Consolidated (1956) (the Mescalero case) has proceeded to trial and decision on the federal reserved water right claims brought by the United States on behalf of the Mescalero Apache Tribe. These claims were based on the PIA standard. The state district court found that the hypothetical irrigation schemes presented by the United States and the Tribe were not in fact economically feasible. The land proposed for farming was therefore not found to be

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[1] These cases are: *State of New Mexico ex rel. Reynolds v. Lewis*, Chaves County Nos. 20294, 22600, Consolidated (1956) (Mescalero Apache Tribe); *State of New Mexico ex rel. Reynolds v. Aamodt*, U.S. Dist. Ct. No. CIV-6639 M (1966) (Nambe Pueblo, San Ildefonso Pueblo, Pojoaque Pueblo, Tesuque Pueblo); *State of New Mexico ex rel. Reynolds v. Abbott*, U.S. Dist. Ct. No. CIV-7488 SC, CIV-8650 SC (1968) (San Juan Pueblo, Santa Clara Pueblo, San Ildefonso Pueblo); *State of New Mexico ex rel. Reynolds v. Abeyta*, U.S. Dist. Ct. No. CIV-7896 SC, CIV-7939 SC (1969) (Taos Pueblo); *State of New Mexico ex rel. Reynolds v. Aragon*, U.S. Dist. Ct. No. CIV-7941 SC (1969) (San Juan Pueblo, Jicarilla Apache Tribe); *Anaya v. Public Service Co.*, Santa Fe County No.43, 347 (1975) (Cochiti Pueblo); *State of New Mexico ex rel. Reynolds v. United States*, San Juan County No. 75-184 (1975) (Navajo Tribe, Jicarilla Apache Tribe, Ute Mountain Ute Tribe); *United States v. Abousleman*, U.S. Dist. Ct. No. CIV-83-1041 SC (1983) (Jemez Pueblo, Zia Pueblo, Santa Ana Pueblo); *State of New Mexico ex rel. Reynolds v. Kerr-Mcgee Corp.*, Cibola County Nos. CB-83-190-CV, CB-83-220-CV (1983) (Acoma Pueblo, Laguna Pueblo, Navajo Tribe); *City of Gallup v. United States*, McKinley County No. CV-84-164 (1984) (Zuni Pueblo).

practicably irrigable, and the court awarded *no* water under the PIA standard.[2] The decision of the court, rendered January 26, 1989, is attached as Appendix A. New Mexico wishes to give this Court the benefit of New Mexico's experience that the PIA standard is not the "feasible and fair" method of quantification envisioned by this Court in *Arizona v. California*, 373 U.S. 546, 601 (1963). Rather, the PIA standard leads to the promotion of wildly speculative schemes, and can result in an award of no water.

The most serious flaw in the PIA standard is that the standard bears no relation to Indian needs, but only to the character of the land on a reservation. This means that the amount of water awarded may be out of any proportion to the efficient use of that water by the Indians in the context of the local economy. New Mexico's long established water law system, which has been designed to encourage water to flow to its most economically efficient use, will be bypassed by awarding water on some basis other than actual need. This is in conflict with this Court's repeated recognition of Congress' deference to state water law. *California v. United States*, 438 U.S. 645 (1978); *United States v. New Mexico*, 438 U.S. 696 (1978).

When a tribe is awarded water in excess of its needs, its interest is no longer in the water itself, but in water as a means to wealth. The doctrine of federal reserved water rights should not be used as a pretext for awarding a source of wealth; it should be addressed to an actual need for water. Water looked upon as a means to wealth rather than as a reservation resource

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[2] The court instead awarded an amount of water which recognized existing Indian uses, and also was, in the court's view, enough water to permit the Tribe to be self-sufficient in the future. Appendix A, Conclusions of Law No. 23, 24.

for actual beneficial use subverts the most fundamental principle of western water law, that "[b]eneficial use shall be the basis, the measure and the limit of the right to the use of water." N.M. Const. Art. XVI, §3. *See also* Ariz. Const. Art. XVII §2; Idaho Const. Art. XV, §3; Colo. Const. Art. XVI, §3; Utah Const. Art. XVII, §1; Wyo. Const. Art. VIII, §3.

Finally, New Mexico's interest lies not only in preserving a workable and efficient structure of water law, but also in protecting relations among peoples within the state. The claims made pursuant to PIA, which without any basis in need threaten a "gallon-for-gallon" uncompensated reduction in non-Indian rights, *United States v. New Mexico, supra*, have created a damaging hostility between Indians and non-Indians. Following the reserved right claims in the Mescalero case, for example, there has been great bitterness at the United States' and Tribe's perceived attempt to preempt non-Indian rights without addressing the Mescaleros' water requirements. New Mexico's interest in preserving harmony among its peoples is best served by a quantification standard which addresses a real need for water.

SUMMARY OF ARGUMENT

The PIA standard of quantification of federal reserved water rights for Indians should be rejected both as a matter of policy and law. As a matter of policy, the PIA standard is disastrous. As applied, it is susceptible to abuse. Advanced engineering techniques, together with manipulations of data, make it possible to claim that huge amounts of lands are, under some speculative factual analysis, "practicably" irrigable. If the claim is successful, it can result in an award which far exceeds Indian needs. If the claim is not successful as in the Mescalero case, or if the reservation is simply not suitable for farming,

a tribe could get no water, or very little water. Furthermore, the PIA standard, because it is based on agriculture, may not reflect a tribe's own economic choices for the use of its land. The shortcomings of PIA arise from adhering to the historical question of the specific purpose of each reservation, rather than recognizing that reservations have the more general purpose of self-sufficiency. That purpose is served by a quantification standard addressed to actual need.

As a matter of law, the PIA standard has not fulfilled the expectation that it would provide a concrete and fair method of quantifying federal reserved water rights. Further, PIA stands in sharp conflict with this Court's recognition that these rights must be quantified in a way that is closely tailored to the needs of the Indian people. In the Mescalero case, a state district court applying federal law rejected on a factual basis the United States' and Mescalero Tribe's evidence supporting their PIA claim. The court adopted a reasonable measure of future Indian needs taken from evidence of projected population. That procedure is equitable, is an ordinary approach in determining water needs and avoids the evils of the PIA standard. This, or some similarly reasonable quantification method, should be adopted by this Court.

ARGUMENT

I. THE PIA STANDARD IS SUBJECT TO ABUSES WHICH UNDERMINE THE INTENT OF THIS COURT

A. The PIA Standard as Applied is Neither Objective Nor Fair.

By its very nature, a PIA case is susceptible to abuses. A tribe faces its single opportunity to claim federal reserved water rights for future water needs, but must use a standard which does not explicitly address those needs. Thus, the temptation

is simply to acquire as much water as the PIA standard allows. To do so, the United States and tribes proffer evidence in support of hypothetical irrigation schemes. The water award then depends on whether these projects would be economicallv feasible, if built.[3] The nature of the economic feasibility analysis is so speculative, and the stakes are so high, that the objectivity of the procedure is easily lost.

When a PIA claim was made in the Mescalero case, the United States acting on behalf of the Tribe and the Tribe itself performed many studies to determine how much acreage on the reservation is irrigable. For one project, the United States and the Tribe proposed a trans-mountain diversion, where a tunnel drilled through a mountain would deliver water to acreage in another basin. The enormous capital costs of this project were to be offset by benefits realized by growing profitable specialty crops, and attaining yields which exceed those attained by commercial producers. Appendix A, Finding of Fact No. 37. Additionally, the United States' and Tribe's economic analysis deviated from standard economic procedures, biasing their benefit-cost analysis in favor of the economic feasibility of the project. Appendix A, Finding of Fact No. 28. This process was by no means the relatively simple, objective inquiry presumably envisioned by the Special Master in *Arizona v. California, supra*, the case which first set forth the PIA standard as "feasible and fair." *Id.* at 601.

Because the projects in Mescalero, as in any PIA case, are invented solely to justify as large an award of water as possible, the United States and the tribes have no incentive to be real-

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[3] PIA has been equated with economic feasibility. February 22, 1982 Special Master Report at 94, *overruled on other grounds, Arizona v. California*, 460 U.S. 605 (1983). It is on the economic feasibility of a proposed project that a PIA case ordinarily turns.

istic or detailed in their planning. Opposing parties are in the intolerable position of attempting to refute a sketchily-drawn hypothetical. The trial court is led into a fantasy world of the possible in the opinion of one expert, as opposed to another possibility in the opinion of another expert. This cannot be the quantification procedure contemplated in *Arizona v. California, supra* at 601, where the Court rejected an alternative standard as calling for guesswork. Rather than reducing the guesswork in the quantification of Indian water rights, the PIA standard, as applied, redoubles it.

B. The PIA Standard Fails Because it is Not Related to Need.

PIA is a mechanical formula, based solely on engineering and economic factors. A PIA analysis could result in a huge water award for a large, fertile reservation with a small population base. Or, a large tribe of Indians living on infertile lands could conceivably end up with a reserved water right insufficient for their present requirements, let alone those of future generations. In the Mescalero case, the United States and Tribe failed to demonstrate the economic feasibility of their projects, and were awarded *nothing* under PIA. Too much water, too little water, or no water at all--any of these results defeats the intent of the reserved rights doctrine as interpreted by this Court. *See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658 (1979).

Neither are the Indians helped by being asked to engage in the meaningless academic exercise of planning irrigation projects which may be inappropriate for the reservation. The Mescaleros, for example, have begun to exploit the recreation potential of their reservation. Under the PIA standard, however, the Mescaleros could not successfully base their claims

on their recreation needs. *See* Appendix A, Finding of Fact No. 32, Conclusion of Law No. 36. By contrast, a sensible way to quantify reserved rights would take into account some notion of the most appropriate use of scarce water resources on the reservation in the light of all of a tribe's resources and its place in the larger economic world. The PIA standard promotes an elaborate charade that does not accomplish this goal. PIA looks at the characteristics of the land; a realistic standard would look at the needs of the Indian people.

The PIA standard's failure to address the real needs of the Indian people arises from the untenable assumption that a federal reserved right for Indian tribes must be narrowly focused to the specific activities originally intended by the federal government. The historical purposes for confining Indians to reservations were many: protecting them from non-Indians and vice versa; allowing for western expansionism; "civilizing" the Indians and ultimately integrating them into mainstream society; as well as the agricultural or grazing purposes sometimes specifically enunciated.[4] To single out any one of these purposes, such as agriculture, ignores the broader purpose of a reservation created for a people. The federal reserved rights doctrine, correctly construed, should address that broader purpose--to make the reservation a viable place for people to live, a home. As the Mescalero court recognized, "[a] purpose for the reservation of water rights for the Mescalero Apache Tribe was to make the Tribe self-sufficient." Appendix A, Conclusion of Law No. 13.

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[4] In the Mescalero case, it would have been particularly inappropriate to tie a water rights award to a specific historic purpose. None of the five Executive Orders setting aside the Mescalero reservation explicitly stated a purpose for the reservation. The court was provided with extensive historic testimony, and asked to impute purposes of agriculture or grazing.

Recognizing that self-sufficiency is the purpose of the federal reserved right doctrine for Indian tribes accomplishes the goal of that doctrine in two ways. First, it permits awards for actual present needs and future uses even if those potential uses were not specifically articulated when the reservation was created. Second, a standard of water rights quantification which addresses self-sufficiency is a straightforward approach to assessing actual Indian need. Such an approach obviates the problem inherent in the PIA standard of a water rights award which could greatly exceed or fall far short of the Indians' actual requirements.

II. FEDERAL RESERVED INDIAN WATER RIGHTS SHOULD BE QUANTIFIED BY THE AMOUNT OF WATER NEEDED FOR A MODERATE LIVING

Because the PIA standard as applied permits awards in excess of need, it falls outside of this Court's clear pronouncements on how federal reserved water rights should be quantified. In *Cappaert v. United States*, 426 U.S. 128 (1976), for example, the Court, after noting that the implied reservation of water rights doctrine "applies to Indian reservations and other federal enclaves," stressed that the doctrine "reserves only that amount of water necessary to fulfill the purpose of the reservation, no more." Further, the quantification of reserved water rights must be "tailored . . . to minimal need." *Id.* at 138, 141. Subsequently in *United States v. New Mexico, supra*, the Court elaborated on these limitations. The Court reemphasized and refined the theme that the implied reservation doctrine measures water rights by the minimum necessary to fulfill the reservation's purposes, stating:

> Each time this Court has applied the "implied-reservation-of-water doctrine," it has carefully examined both the asserted water right and the

> specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated.
>
> *Id.* at 700.

One year later, in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, supra* at 686, the Court concluded:

> As in *Arizona v. California* and its predecessor cases, the central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than, is necessary to provide the Indians with a livelihood--that is to say, a moderate standard of living.

Arizona v. California, supra, is the source of the PIA standard. The Court's reference in *Washington* to the *Arizona v. California* case, therefore, indicates what the Court must have intended by the PIA standard. The Court must have intended that the standard result in a water rights award which would provide the Indians with a moderate standard of living. The PIA standard as applied, however, defeats the Court's intent, as it permits awards which bear no relation to the standard of living of the tribe, but only to the characteristics of the reservation. The PIA standard, because it fails in practice to address a real need for water, should be rejected by the Court.

III. ALTERNATIVE STANDARDS OF QUANTIFICATION EXIST WHICH ARE WORKABLE AND FAIR

The process of determining need is neither unduly difficult nor unusual in the west. In the Mescalero case, for example, the court recognized current uses, and also awarded water for future uses based on a projected population figure. Appendix A, Conclusions of Law No. 23, 24. This procedure is commonly used by the New Mexico State Engineer in acting on water right applications for municipalities in the state. Additionally, in at least one administrative proceeding, the state produced an econometric model of a large southwestern city in order to determine that city's future needs. *In the Matter of the Applications of the City of El Paso*, HU-12 through HU-71, LRG-92 through LRG-357 (1980). Another option is to quantify water rights in connection with a tribe's own choices for self-sufficiency. In the Mescalero case the state suggested that, because the Mescaleros' chief economic activity is recreational development, a proper quantification method might be an award of water for those uses. Such an award would of course be capped by actual needs.

All of these possibilities are reasonable, and would tie a water award to a tribe's real needs in accordance with the decisions of this Court. New Mexico urges that these or other workable standards be applied in quantifying federal reserved water rights for Indians.

CONCLUSION

For the foregoing reasons, New Mexico requests that the Court reject the PIA standard, and adopt a standard related to need.

Respectfully submitted,

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March 9, 1989

APPENDIX A

FIFTH JUDICIAL DISTRICT COURT
COUNTY OF CHAVES
STATE OF NEW MEXICO

STATE OF NEW MEXICO, EX REL.
S.E. REYNOLDS, State Engineer,
and PECOS VALLEY ARTESIAN
CONSERVANCY DISTRICT,

Plaintiffs,

v.

L.T. LEWIS, et al.,
UNITED STATES OF AMERICA,

Defendants,

MESCALERO APACHE TRIBE,

Defendant-Intervenor

and

STATE OF NEW MEXICO, ex rel.
S.E. REYNOLDS, State Engineer,
and PECOS VALLEY ARTESIAN
CONSERVANCY DISTRICT,

Plaintiffs,

v.

HAGERMAN CANAL CO., et al.,

Defendants.

Nos. 20294 and 22600
CONSOLIDATED

RIO HONDO SECTION
Mescalero Section

DECISION OF THE COURT

FINDINGS OF FACT

1. The aboriginal title of the Mescalero Apache Tribe remains today in the present Reservation lands.

2. There is no evidence of Mescalero Apache Tribe aboriginal use of water.

3. On July 1, 1852, the United States, the Mescalero Apache Indian Tribe, and others entered into a treaty which was ratified by the United States Senate in 1853.

4. This 1852 treaty was a peace and amity treaty. The treaty expressly did not designate a reservation of land.

5. Numerous actions of federal government officials between 1852 and 1873 established that the 1852 treaty was not intended to be a treaty of reservation. There were suggestions that the Mescalero Apaches be placed on reservations in areas outside of the White and Sacramento Mountains. The reservations included the Fort Thorne Reservation, and reservations on the Rio Felix, Gila River, and Rio Penasco. The Bosque Redondo was established as a permanent reservation for the Mescaleros by Executive Order dated January 15, 1864, and subsequently abandoned and restored to the public domain.

6. The Mescalero Apache Reservation was created by five executive orders beginning in 1873: The Executive Order of May 29, 1873; the Executive Order of February 4, 1874; the Executive Order of October 20, 1875; the Executive Order of May 19, 1882; and the Executive Order of March 24, 1883.

7. The first Executive Order of May 29, 1873, withdrew land from the public domain for the purpose of providing arable land and grazing lands for a Mescalero Apache Reservation. When the reservation boundaries were originally designated in 1873, there was a specific intent on the part of federal officials to protect the agricultural economy and water supply of non-

Indian farmers who had settled the arable lands along the Rio Ruidoso valleys prior to 1873. In 1873, the Rio Bonito, Rio Hondo and Rio Ruidoso valleys were occupied by settlers. These lands and the appurtenant water appropriated by those settlers were not available for a reservation. In response to these Indian/non-Indian land use conflicts, all of the irrigated lands along Rio Ruidoso were expressly excluded from the 1873 Executive Order reservation.

8. None of the arable lands of the United States' and Mescalero Apache Tribes' proposed projects lie within the 1873 Executive Order Reservation boundaries.

9. On February 8, 1874, an Executive Order withdrew land from the public domain for the purpose of adding arable land and grazing land to the reservation. All of the arable lands along the Rio Ruidoso were excluded from the reservation by the 1874 Executive Order to protect the agricultural economy and water supply of non-Indian farmers who had settled the arable land along the Rio Ruidoso prior to 1873.

10. Only small amounts of arable lands of the United States' and Mescalero Apache Tribes' proposed projects are within the 1874 Executive Order boundaries.

11. On October 20, 1875, an Executive Order withdrew land from the public domain for the purpose of providing the reservation with grazing acreage. A portion of the Rio Tularosa Valley that had been settled by non-Indians was inadvertently included within the reservation. Despite recommendations to the contrary, an express decision was made not to withdraw arable lands along the Rio Ruidoso settled by non-Indians for the use of the Indian Reservation in the 1875 Executive Order. There were no subsequent attempts to include irrigable lands along the Rio Ruidoso in the reservation.

12. On May 19, 1882, an Executive Order withdrew land from the public domain for the purpose of providing grazing land to the reservation. Contiguous unsettled arable land along the Rio Penasco was passed up in favor of additional grazing acreage. Two major areas of arable land were deleted from the reservation and returned to the public domain by the 1882 Executive Order. In response to non-Indian mining interests, the arable land along the Rio Bonito that was reserved by the 1873 and 1874 Executive Orders was deleted from the reservation and returned to the public domain. The arable land in the Rio Tularosa Valley that had been reserved by the 1875 Executive Order was deleted from the reservation and returned to the public domain because it was occupied by non-Indian settlers prior to 1875.

13. On March 24, 1883, an Executive Order withdrew land from the public domain for the purpose of providing more arable land for the reservation. Specifically, this boundary adjustment was made to correct a prior surveying error so that the Indian farms at Three Rivers would be included in the reservation. These farms had been unintentionally excluded by the 1882 Executive Order.

14. Approximately ten percent of the Rio Ruidoso watershed (from its headwaters to its confluence with the Rio Bonito) is located within the boundaries of the Mescalero Apache Reservation.

15. The vast majority of the lands proposed for the Rinconada and Pajarita Projects are in the 1875 Executive Order land withdrawal.

16. The lands identified by the United States and Tribe for irrigation in the Pajarita unit are arable and irrigable.

17. The lands identified by the United States and Tribe in the Rinconada area for irrigation are arable.

18. The lands identified by the United States and Tribe for irrigation of a golf course at Carrizo are arable and irrigable.

19 There was more land in irrigation along the Rio Ruidoso in 1873 than is irrigated today. Currently, there is an insufficient surface flow in the Rio Ruidoso to meet existing irrigation needs for pre-1873 priorities. The Rio Ruidoso, the Rio Hondo, and the Rio Bonito are water short as evidenced by the reliance on supplemental wells in the stream system. During critical irrigation months, the river stream is extremely water short.

20. There is an inadequate water supply available for the "included" acres of the Rinconada project, even assuming that the entire surface flow of the Rio Ruidoso at the boundary of the reservation is available for diversion and is not subject to appropriation by downstream users with prior rights.

21. Rather than assessing the lack of water during critical irrigation months, the United States and Tribe analyze shortages on an annual average basis. In conducting an operational analysis, neither yearly nor monthly figures reveal the usable divertable flows. Analysis of water availability based upon annual or monthly averages disguises flood flows and overstates actual water availability. The most accurate analysis is based on daily flows. There is no "average" surface stream flow in the Rio Ruidoso as a matter of fact.

22. No water supply exists for either the "omitted acres" of the Rinconada/Carrizo unit or the "omitted acres" of the Pajarita unit.

23. The existing water uses of the Mescalero Apache Tribe is 1,372.4 acre feet diversion per year.

24. The amount of water needed from the Rio Hondo stream system to meet the future domestic, recreational, and

other non-agricultural needs of the Tribe is 950 acre feet diversion per year.

25. The proposed diversion by the United States and Tribe of surface water out of the Rio Ruidoso watershed would upset the hydrologic balance of the Rio Ruidoso stream system, reducing the amount of surface water available in the stream to recharge the alluvium of the stream bed and/or to enter the hydrological stream of the Roswell Basin as underflow or floodflow.

26. In applying a benefit-cost analysis to quantify federal reserved water rights, it is necessary to follow commonly accepted, standard economic procedures. When a benefit-cost analysis is used to establish property rights in water rights litigation, the analysis is subject to distortion and bias.

27. Every benefit-cost analysis has three distinguishing characteristics: 1) all benefits and costs are included regardless of to whom they accrue; 2) benefits are measured by consumer willingness to pay; 3) costs are measured by opportunity costs, which may differ from project expenditures.

28. No special rules apply to economic feasibility analysis for determining whether a proposed Indian water project will reflect a benefit-cost ratio greater than one. In deviating from standard economic procedures, the United States and Tribe biased their benefit cost analysis in favor of economic feasibility of the project.

29. In an economic feasibility analysis, particularly in the field of water resources, there are impacts that go beyond the immediate investing entity and the beneficiaries for whom they are designed. Thus, an economic feasibility analysis should not be restricted by political boundaries. The United States and Tribe claim benefits for products moved off the reservation, but fail to consider costs that accrue beyond the reservation boun-

dary. This approach biases the outcome of the analysis in favor of economic feasibility.

30. An economic analysis is based on the concept of opportunity cost. The foregone benefits of users that would be incurred are relevant external opportunity costs that should be considered under a properly constituted economic feasibility study. The United States and Tribe did not consider these costs.

31. The economic analyses submitted by the United States and Tribe omit numerous off-reservation economic costs, including lost agricultural production along the Lower Rio Ruidoso, fishery losses, property devaluation, and the costs of constructing alternative municipal water supplies.

32. With respect to the Rinconada Project, the United States and Tribe analyzed capital costs as if the project were to be developed primarily for recreation purposes. They attributed all costs to recreation, except for incremental costs essential for irrigation. They assigned approximately 75% of the water costs on the Rinconada to recreation even though 68% of the water is to be utilized for agriculture. The result of this division of costs between recreation and agriculture, as calculated by the United States and Tribe makes the cost per acre of agricultural development appear lower than it would be. It is also the equivalent of using recreational benefits to justify a reserved rights award under a practicable irrigable acreage analysis. This is improper, because each component of a project must be evaluated on its own merits, and costs must be assigned proportionately.

33. The United States' and Tribe's analysis of the Rinconada project in effect rejects practicably irrigable acreage as the basis of their claims. It substitutes recreation as the primary purpose of the proposed project in order to create a justifiable capital cost for agriculture.

34. Under generally accepted standards for economic feasibility analyses, both the Rinconada and Pajarita developments proposed by the United States and Tribe are infeasible. Even making all favorable assumptions, and not including off-reservation costs, the projects would not return sufficient funds to pay for their construction, maintenance, replacement and operation costs.

35. The United States' and Tribe's reliance on specialty crops for both projects does not comport with appropriate economic procedures which consider the proper ratio of specialty to basic crops.

36. The United States' and Tribe's analysis of markets for specialty crops was inadequate and failed to follow generally accepted evaluation criteria. Given the production conditions existing on the reservation, including water supply issues, the Mescalero Reservation has no comparative market advantage over existing supplying regions.

37. The United States' and Tribe's methods of calculating crop yields for both projects do not conform to appropriate economic procedures. Thus, the proposed crop yields are greatly overstated and unrealistic compared to what other commercial producers realize.

38. The physical constraints of the terrain, the geographical location of the Reservation, and the variety and selection of crops dictate high quality, top level management. The United States and Tribe failed to budget sufficiently for this necessity.

39. The United States and Tribe failed to specifically or adequately quantify the risks inherent in both projects related to weather, markets, labor, insects, disease, and all other risks that go along with agricultural production.

40. The United States and Tribe have overstated accomplishment rates and understated costs of machinery equipment.

41. Crop budgets must include factors such as storage, transportation, quality adjustments, supply and demand, seasonal price differences, and market structure in order to define accurately proposed prices and production costs. The United States and Tribe failed to include all of these factors in their crop budgets for both projects.

42. The accounting system used by the United States and Tribe does not totally account for the costs of establishment and maintenance of the various crops in their net benefit analyses for the projects.

43. Sound economic theory requires a detailed analysis of the labor cost component in project development, and limits the benefits which can be claimed for labor. The United States and Tribe failed to perform that analysis and therefore understated the costs for both projects.

44. The Rinconada project as proposed is undercosted by almost 12 million dollars. The United States' and Tribe's analysis of the water delivery system for the unit is an incomplete "reconnaissance-level" study. It is inadequate to permit a proper assessment of the project feasibility as relates to the tunnels, pipelines and dams and pumpback system designed to supply water to the project.

45. The Mescalero Apache Tribe has successfully diversified its non-agricultural economic interests and pursuits. The continued prosperity of the Tribe and a successful economic utilization of its lands are not dependent on the proposed agricultural development in the Pajarita and Rinconada projects.

CONCLUSIONS OF LAW

1. This Court has personal jurisdiction over all claimants to the use of water of the Pecos River System within the territorial boundaries of the State of New Mexico.

2. The Court has subject matter jurisdiction over this case.

3. All claimants with rights to the use of water of the Pecos River System have standing to contest and participate in hearings involving the claims for rights to the use of water filed by the United States on behalf of the Mescalero Apache Tribe.

4. Notice of the opportunity to contest the claims to the use of water filed by the United States on behalf of the Mescalero Apache Tribe, present evidence and be heard was provided by personal service and notice of publication to all claimants to the use of water of the Pecos River System within the territorial boundaries of the State of New Mexico.

5. The judgment of this Court is final and binding on the State of New Mexico and all claimants to the use of the waters of the Pecos River System within the State of New Mexico.

6. The United States established on behalf of the Mescalero Apache Tribe a right to the use of water from the surface water and related groundwater of the Rio Hondo and its tributaries for present and future uses of the Mescalero Apache Tribe.

7. The Mescalero Apache Tribe holds aboriginal title to its present-day Reservation.

8. Aboriginal Indian title derives from exclusive and prolonged occupancy and use of a resource. There is no aboriginal priority date under which federal reserved water rights for the Mescaleros can attach.

9. Aboriginal title is not a property right, but provides only a right of occupancy as against the United States until such time as the right is extinguished.

10. Congress has the right and power to extinguish Indian aboriginal title.

11. All waters arising on the public domain out of which the Mescalero Apache Reservation was first designated in 1873 were severed from the public domain by acts of Congress beginning in 1866.

12. The United States holds title in trust for the Mescalero Apache Tribe to the quantity of water awarded.

13. A purpose for the reservation of water rights for the Mescalero Apache Tribe was to make the Tribe self-sufficient.

14. Self-sufficiency of the Mescalero Apache Tribe on a reduced land base or reserve requires development of present and future uses of available water.

15. A purpose of reserving water rights for the Mescalero Apache Tribe was to provide a permanent homeland for them.

16. A permanent homeland for the Mescalero Apache Tribe requires development of present and future use of water.

17. A permanent homeland for the Mescalero Apache Tribe requires water for recreation, agriculture, domestic, stock, commercial, industrial and other uses for the "arts of civilization."

18. Self-sufficiency of the Mescalero Apache Tribe on their Reservation requires multiple and varied uses of water for recreation, agriculture, domestic, stock, commercial, industrial and other uses for the "arts of civilization."

19. Equitable Estoppel is not an appropriate principle in the adjudication of the Mescalero Apache Tribe rights to the use of water.

20. Balancing of equities is not to be considered in the quantification of the Mescalero Apache Tribe rights to the use of water.

21. Quantification of the rights of the Mescalero Apache Tribe to the use of water is governed exclusively by federal law.

22. Practicable irrigable acreage is the appropriate method of quantification of the future agricultural water right for the Mescalero Apache Tribe.

23. The 1372.4 acre feet per year for existing uses of water on the Mescalero Apache Reservation is necessary to meet the purposes of the Mescalero Apache Reservation and is a valid right.

24. The 950 acre feet of water for projected future uses except agricultural uses is necessary to meet the purposes of the Mescalero Apache Reservation and is a valid right.

25. Priority of the right to the use of water by the Mescalero Apache Tribe is governed exclusively by federal law.

26. The 1852 Treaty was one of peace and amity between the United States and the various tribes which constituted the Apache Nation. In express terms it did not establish a reservation for the Mescalero Apache Tribe. As a matter of law, the treaty cannot be used as the basis for any federal reserved water right.

27. The Mescalero Apache Reservation was first established by the federal government in the Executive Order of May 29, 1873, which reserved specific lands for the Mescaleros. Until that time, no water was impliedly reserved for the Mescalero Apache Reservation.

28. The Winters or federal water rights doctrine stands for the proposition that when the federal government withdraws its land from the public domain and reserves it for a federal purpose, the government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. Under the Winters Doctrine,

the federal government, not the Indians, implicitly reserves the water rights. Federal reserved rights can arise only in water unappropriated as of the date of the withdrawal of lands from the public domain.

29. The priority of lands withdrawn by Executive Order is the date of the reservation; if there are successive withdrawals of land, there are successive priority dates relating to the specific lands withdrawn.

30. Federal reserved water rights can be implied only to the extent needed to satisfy the contemporaneous purposes for which lands were withdrawn; if there are successive withdrawals, reserved water rights can be implied only to the extent needed to satisfy the purposes of each withdrawal.

31. When there is an expressed intent to exclude land and appurtenant water from a reservation a contrary intent cannot be implied.

32. Federal reserved rights can arise only in water unappropriated as of the date of the withdrawal of lands from the public domain.

33. The method of quantifying federal reserved rights is not necessarily the same for all reservations.

34. If practicably irrigable acreage method of quantification is appropriate in this case, the United States and Tribe have failed to sustain their burden of proof. The proposed Rinconada and Pajarita projects are not economically feasible, nor is there sufficient water available to supply the proposed Rinconada project.

35. A proper benefit-cost analysis required to determine practicably irrigable acreage takes into account all of the benefits and all of the costs regardless of the costs to whom they

accrue. Such an analysis must be conducted according to generally accepted economic principles which are consistently applied.

36. Recreation is not a permissible use under a practicably irrigable acreage analysis.

37. Recreation is a permissible use, but the benefits therefrom cannot be used to bolster the economic feasibility analysis for an agricultural project.

38. Once quantified, the water rights awarded may be put to any use.

/s/ LaFel E. Oman

District Judge Pro Tempore
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Supreme Court, U.S.
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IN THE
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OCTOBER TERM, 1988

STATE OF WYOMING,
Petitioner,
v.
UNITED STATES OF AMERICA, SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Wyoming

BRIEF OF THE VILLAGE OF RUIDOSO AS *AMICUS CURIAE* IN SUPPORT OF THE STATE OF WYOMING

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March 9, 1989

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QUESTION PRESENTED

In the absence of any demonstrated necessity for additional water to fulfill reservation purposes and in the presence of substantial state water rights long in use on the Reservation, may a reserved water right be implied for all practicably irrigable lands within a Reservation set aside for a specific tribe?

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On Writ of Certiorari to the Supreme Court of Wyoming

BRIEF OF THE VILLAGE OF RUIDOSO AS *AMICUS CURIAE* IN SUPPORT OF THE STATE OF WYOMING

The *Amicus Curiae*, The Village of Ruidoso, a political subdivision of the State of New Mexico, respectfully urges that this Court reconsider and reject "practicably irrigable acreage" ("PIA") as the standard for quantification of a federal reserved water right for agricultural purposes on an Indian reservation and adopt a standard which grants sufficient water to assure the Indian people living on the reservation a moderate standard of living. The Village of Ruidoso further urges that if the Court retains PIA as the standard for quantifying reserved water rights for agricultural purposes, the economic anal-

ysis or quantification must take into account the unique historical characteristics of water use on and off the reservation on which the federal reserved water rights are being quantified.

INTEREST OF THE *AMICUS CURIAE*

The Village of Ruidoso diverts water from the Rio Ruidoso, a tributary of the Hondo River in Lincoln County, New Mexico, for the purpose of supplying municipal, domestic, sanitation and commercial water to the residents of the Village. The Village's point of diversion on the Rio Ruidoso is located a short distance downstream from the point of diversion of the Mescalero Apache Tribe on the portion of the Rio Ruidoso located within the Mescalero Apache Reservation. The estimated population of the Village is 10,000 and a total of 6,683 water meters are served within the municipal limits.

Approximately 90% of the water delivered through the Village's municipal water supply system is for domestic and sanitary purposes. The water rights of the Village, consisting of both surface and groundwater rights, were provisionally adjudicated in an omnibus stream system adjudication proceeding known as *State ex rel. S.E. Reynolds, State Engineer v. L.T. Lewis, et al.* Chavez County District Court Cause No. 20294 and 22600, Consolidated. In this same case the federal reserved water rights of the Mescalero Apache Tribe are being adjudicated. The Tribe claimed, *inter alia*, the right, based upon the practicably irrigable acreage standard, to divert from the Rio Ruidoso and consume a total of some 4,700 acre feet a year with a priority earlier than all Non-Indian water right priorities. While 4,700 acre feet a year from the Rio Ruidoso Stream System pales in comparison to the awards of water to the Shoshone and Arapaho Tribes in the instant case, the report prepared by the expert witness for the Village showed that such an amount repre-

sents more than half of the total annual average discharge of the Rio Ruidoso at the reservation boundary. The District Court of Chaves County, per LaFel Oman, District Judge Pro Tempore, (and former Chief Justice of the New Mexico Supreme Court) rejected on evidentiary grounds the Tribe's claim to a federal reserved water right on the basis of practicably irrigable acreage (*see* Appendix A to the *Amicus Curiae* brief of the State of New Mexico). The Court, however, did uphold practicably irrigable acreage as an appropriate method of quantification of a future agricultural water right for the Tribe. An appeal by the Tribe and the United States of the Court's decision is probable. In the event the Court's decision on the Tribe's practicably irrigable acreage claim was reversed and the Tribe's right to a federal reserved water right based on PIA confirmed, the Village's future ability to deliver water to its inhabitants would be substantially impaired.

SUMMARY OF ARGUMENT

PIA, as a standard of quantification for federal reserved water rights on Indian agricultural reservations, is not related to the real needs of the Indian people. Presently, PIA is used by the United States and the Tribe to create property rights in water vastly in excess of what is necessary to support the agricultural purpose of the reservation. PIA is at odds with the decisions of this Court with respect to the quantification of federal reserved water rights for Non-Indian federal reservations. It is grossly inequitable to other water users in what are often water short stream systems with rights long established under State law.

A standard of quantification for agricultural Indian reservations which recognizes the need of the Indian people to attain a moderate standard of living is not only consistent with the recent decisions of this Court but is fair to all parties directly affected by the quantification

of the Indian reserved water right. If, however, the Court decides to retain PIA in some form the lower courts should be instructed to require the United States and the Tribe to undertake an economic analysis which takes into account economic impacts or the opportunity costs on historical uses of water on and off the Indian reservation.

ARGUMENT

I. PRACTICABLY IRRIGABLE ACREAGE SHOULD BE REJECTED AS THE STANDARD FOR QUANTIFYING A FEDERAL RESERVED WATER RIGHT FOR AGRICULTURAL INDIAN RESERVATIONS. IN ITS PLACE A STANDARD OF QUANTIFICATION SHOULD BE ADOPTED WHICH GRANTS A FEDERAL RESERVED WATER RIGHT TO THE TRIBE BASED UPON THE MINIMAL NEEDS OF THE INDIVIDUAL RESERVATION WHICH WILL PROVIDE THE INDIAN PEOPLE LIVING ON THE RESERVATION A MODERATE LIVING.

The *Amicus Curiae*, Village of Ruidoso joins with the Petitioner, and the Western States who support the Petitioner as *amici curiae* in urging this Court to reject practicably irrigable acreage ("PIA") as the only standard of quantification of an implied federal reserved water right for agricultural Indian reservations. The Village of Ruidoso further concurs with the contention of the Petitioner and the other *amici* that the PIA standard should be replaced with a standard of quantification which affirms the Tribe's reserved right in the natural resources of the reservation in an amount necessary to meet the Tribe's minimal needs and provide a moderate standard of living. This new standard would require that the Tribe be awarded only that amount of water sufficient to assure that the primary purpose of the reservation is not entirely defeated and the Indian people on the reservation enjoy a moderate living.

Adoption by the Court of a new standard would result in the quantification of federal reserved water rights for

Indian Tribes being brought into line with the standard of quantification for all other federal reservations. There is simply no basis in policy or law for disparate treatment of federal reserved water rights for Indian reservations and Non-Indian federal reservations. If such a dichotomy ever did make sense it is now clear that the difficulties encountered by the lower courts in implementing two substantially distinct standards of quantification furnishes abundant reason for this Court to abolish PIA.

The unfortunate truth is that PIA as a standard of quantification of a federal reserved water right for Indian agricultural reservations has been seized upon by the United States and the Tribes as a means for acquiring a property right in a large amount of water without any regard to the real needs of the Indians. Additionally, the United States and the Tribe generally claim a priority date for the Tribe's water rights which is earlier in time than the water rights of all, or at least most, Non-Indian users. In the arid west where many stream systems are already chronically over appropriated the imposition of another substantial draft on the stream system ahead of appropriations long established under state law can lead only to severe economic dislocation to those users.

The enormous award of water to the Respondent Tribes in the instant case, without any demonstrated need for the water, and on a reservation where State approved water rights were relinquished and other state water rights already exist, fully points out the fallacy of the PIA quantification standard. Similarly, the federal reserved water right claims of the Mescalero Apache Tribe in *L.T. Lewis* presents yet another dramatic example of how the PIA approach is abused by the United States and the Tribe. The executive order setting aside that portion of the Mescalero reservation in which the Tribe and the United States claimed PIA as the standard of quantification for the proposed water project was for grazing purposes only. Despite this inconvenient historical fact the United States and the Tribe, under

the guise of a "permanent homeland" for the Tribe, claimed the right to divert thousands of acre feet of water a year from the water short Rio Ruidoso stream system. This water would be used to irrigate approximately 2800 acres of land, deemed to be practicably irrigable. The locale of this project is not even within the same portion of the reservation where the Rio Ruidoso drainage lies. Rather the United States and the Tribe proposed to transport the water by means of a series of intricate tunnels and pipelines to lands in a separate drainage.

While Justice Oman in his decision on the Mescalero claims in *L.T. Lewis* correctly found that the project was not economically feasible, he ruled nevertheless that PIA was the appropriate standard of quantification of a future agricultural water right for the Mescalero Tribe. He further ruled that the analysis presented by the United States and the Tribe failed to meet the PIA standard because it did not take into account all the benefits and all costs regardless to whom they accrue.

Unlike the Wyoming Supreme Court which gave short shrift to the this issue, Justice Oman recognized that a proper benefit/cost analysis to determine the economic feasibility of an Indian water project must take into account economic impacts beyond the boundaries of the reservation. (See Point II below.)

This Court made it clear in a series of cases since its landmark decision in *Arizona v. California*, I, 373 U.S. 546 (1963) that PIA may have outlived its usefulness as the sole standard of quantification for all Indian reservations. *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979). This case followed the Court's decision in *Cappaert v. United States*, 426 U.S. 128 (1976) that the only water reserved for the federal reservation in that case was to meet the "minimal needs" of the reserva-

tion 426 U.S. 128 (1976). This Court found in *Fishing Vessel* that the Indians were entitled to a right to the natural resource involved in that case to provide the Indians with a "moderate living". 443 U.S. at 686.

The instant case furnishes the Court with the opportunity to lay to rest once and for all PIA as the sole standard of quantification of an Indian agricultural reserved water right and adopt in its place a standard which quantifies the Indian federal reserved water rights in an amount which is sufficient to meet the minimal needs of the Tribe and not defeat the primary purpose of the reservation. Cf. *United States v. New Mexico*, 438 U.S. 696 at 700 (1978). If the Tribe wishes to expand the use of water on the reservation for purposes beyond the primary purpose Congress originally mandated, the Tribe must acquire the existing rights of other water users in the stream systems. Compare *United States v. New Mexico* at 702. This approach fairly protects the rights of all users on the stream system while, at the same time, allowing the Tribe to meet its goal of a moderate standard of living for its people. Because PIA fully distorts the process of determining federal reserved water rights for Indian agricultural reservations, it should no longer be followed.

II. IF PRACTICABLY IRRIGABLE ACREAGE IS RETAINED AS THE STANDARD FOR QUANTIFYING FEDERAL RESERVED WATER RIGHTS FOR AGRICULTURAL PURPOSES ON AN INDIAN RESERVATION, THE QUANTIFICATION OF PRACTICABLY IRRIGABLE ACREAGE SHOULD TAKE INTO ACCOUNT THE UNIQUE HISTORICAL CHARACTERISTICS OF WATER USE ON AND OFF THE RESERVATION WHERE FEDERAL RESERVED WATER RIGHTS ARE BEING QUANTIFIED.

In *Arizona I*, the Court adopted PIA as the standard by which to measure federal reserved water rights for agricultural and related uses on Indian reservations. As its rationale, the Court cited favorably the

Special Master's ruling that the quantity of the water intended to be reserved should satisfy both present and future needs of the reservations. Given the difficulty of defining future needs, the Court agreed with the Master that irrigable acreage was the only feasible and fair way to determine the amount of reserved water. *Id.* at 600-601. The test of PIA was economic feasibility or benefit/cost analysis, specifically, "a finding that annual benefits exceed costs." Report of the Special Master, *Arizona v. California*, hereafter Arizona II, No. 8 Original (Feb. 22, 1982), pp. 90, 94 and 100.

Benefit/cost analysis is an assessment of the benefits of reallocating resources and comparing those benefits to the costs associated with the reallocation. There are three distinguishing characteristics of a benefit/cost analysis: (1) it attempts to capture all the benefits and all the costs in a resource allocation regardless to whom they accrue; (2) benefits are measured by consumer willingness to pay for the goods or services being provided, which is not necessarily the market price; and (3) costs are measured in terms of opportunity costs or what society gives up when it moves a resource from one use to another use.

Arizona I was brought for the purpose of allocating compact entitlement between the States of the Lower Colorado River Basin. Recent cases have involved the statutory adjudication of water rights among individual users who have a long history of rights under state law. Since *Arizona I*, the methodology used to quantify PIA has not been uniformly or consistently applied, particularly in cases involving conflicting claims between Indian and non-Indian claimants. Indian tribes in these cases have attempted to alter the economic standards of *Arizona I* in order to maximize the reserved rights they seek. *L.T. Lewis* is a case in point.

In *L.T. Lewis*, the economic evidence presented to the Court reflected a disagreement between the parties over the conceptual approach and methodology that should be

used to conduct a benefit/cost analysis of the Mescalero Apache Tribe's proposed agricultural project, which was the basis of its claim for some 4,700 acre feet per year of reserved water rights. The State and the Non-Indian Defendants contended that the economic standards employed should be the same for all water projects, including those on Indian reservations. The United States and Mescalero Tribe disagreed, asserting that current water project standards were inappropriate to quantify reserved water rights for Indian tribes.

At issue in *L.T. Lewis* was whether the opportunity costs or what society gives up when it transfers a resource from one use to another should be included in the analysis. The State and Non-Indian Defendants pointed out that the studies of the project prepared by the United States and the Tribe did not take into account any opportunity costs or economic impacts of the project that would accrue outside the reservation boundary. The State and the non-Indian defendants contended that any assessment of the economic feasibility of the proposed project must include all costs as well as all benefits of diverting the waters of the Rio Ruidoso, whether they would accrue on or off the reservation or affect Indians or Non-Indians. The reservation is intertwined with the regional economy and therefore, to limit the analysis to the reservation alone as the United States and the Tribe did was a deviation from the economic feasibility standards of *Arizona I*.

The United States and the Mescalero Tribe acknowledged that their feasibility study did not include any opportunity costs outside the reservation boundary. Their study did, however, include benefits accrued off the reservation. Their explanation of this inconsistency was that the quantification of Indian reserved water rights is unique and therefore, the conceptual approach that typically underlies a benefit/cost analysis may vary on a case by case basis. In *L.T. Lewis*, they asserted that off-reservation impacts should not be considered in the quantification of the Tribe's water rights. Only those

costs that would accrue on the reservation were considered in their economic analysis.

By limiting the scope of their study to the boundaries of the reservation, the United States and the Mescalero Tribe excluded major opportunity costs that would accrue off the reservation. This exclusion enabled the United States and the Tribe to calculate a benefit cost ratio biased in favor of the project's economic feasibility.

To buttress their contention that economic analysis used to quantify Indian water rights should exclude opportunity costs that accrue off the reservation, the United States and the Tribe argued that standard benefit/cost methodology was modified by the doctrine of prior appropriation. They conceded that an opportunity cost is normally an essential element of an economic analysis, notwithstanding prior appropriation.

Benefit/cost analysis was the analytical tool the Mescaleros themselves selected to quantify their rights. The State and non-Indian defendants argued that in using benefit/cost analysis to determine economic feasibility, foregone costs of prior appropriated uses of the water would routinely be part of the calculus.

The United States and the Mescalero Tribe also objected to the inclusion of opportunity costs that would accrue off the reservation on the grounds that it would constitute a weighing of the equities between Indians and non-Indians. They equated weighing of the equities enunciated by this Court in *Cappaert v. United States*, *supra*, at 138, with the sensitivity doctrine enunciated by this Court in *United States v. New Mexico*, *supra*, at 696. The State and the non-Indian defendants successfully argued that neither the sensitivity doctrine nor a balancing of competing interests should apply to the issue of whether opportunity costs should be evaluated. The question in *L.T. Lewis* was whether the Court should exclude an element of benefit/cost analysis, *i.e.*, opportunity costs, when considering the economic feasibility of an Indian project.

The United States and the Tribe's approach to economic feasibility corrupted the process and rendered fanciful the purpose of an economic feasibility test. By altering the standards of a benefit/cost analysis to suit their purpose, the United States and Tribe insured that the results would be favorable.

In *L.T. Lewis*, Justice Oman held that commonly accepted, standard economic procedures must be followed in applying a benefit/cost analysis and that no special rules should apply to an economic feasibility analysis of a proposed Indian water project. Justice Oman also held that an economic analysis is based on the concept of opportunity cost. He also ruled that the foregone benefits of users that would be incurred are relevant external opportunity costs that should be considered under a properly constituted economic feasibility study.

Justice Oman also found that the United States and Tribe omitted numerous off-reservation economic costs, including lost agricultural production along the Lower Rio Ruidoso, fishery losses, property devaluation, and the costs of constructing alternative municipal water supplies. Justice Oman concluded that under generally accepted standards for economic feasibility analysis, the agricultural project proposed by the United States and the Mescalero Tribe was not economically feasible.

The deviations from the PIA methodology of *Arizona I* were largely rejected in *L.T. Lewis*. Like the Mescalero Tribe in *L.T. Lewis*, the Shoshone and Arapaho Tribes in *In re General Adjudication of All Rights to Use Water in the Big Horn Stream System*, 753 P.2d 76 (Wyo. 1988), hereafter *Big Horn*, restricted their evaluation of their agricultural project to the costs within the boundaries of the reservation, thereby excluding any economic impacts or opportunity costs that would accrue off the reservation. The Tribes' analysis, like that of the Mescalero Tribe in *L.T. Lewis*, took into account the benefits of the project whether they accrued on or off the reservation. This conceptual approach was challenged by the

State and the Non-Indian Defendants, who pointed out that the inclusion of on and off reservation benefits and the exclusion of off reservation costs would distort the results of the analysis by increasing the apparent feasibility of the project. The Special Master in *Big Horn* rejected this argument and ruled that no opportunity costs accruing off the reservation could be introduced as evidence.

Like the Mescaleros in *L.T. Lewis*, the Shoshone and Arapaho Tribes also treated some of the costs within reservation boundaries as benefits. Envisioning that a substantial number of unemployed Indians would be employed by the project, the Tribes argued that their employment would be a benefit and included it in their analysis. The Tribes acknowledged that labor would be a cost to them and would be treated as a cost in a standard benefit/cost analysis. Nonetheless, the Special Master in *Big Horn* upheld the Shoeshone and Arapaho Tribes' deviation from standard methodology. In *L.T. Lewis*, the State and the Non-Indian Defendants successfully challenged the Mescaleros' treatment of labor costs as benefits. They were also successful in convincing Justice Oman that the Mescaleros had distorted standard benefit cost analysis and that the proposed agricultural project was economically infeasible.

Given the conflicting decisions in *L.T. Lewis* and *Big Horn*, it is essential that if the concept of PIA is retained as the standard of measurement for federal reserved water rights that it be coupled with instructions to the lower courts that economic feasibility studies adhere to the following principles of a benefit/cost analysis:

1. All benefits and all costs must be captured in a resources allocation regardless to whom they accrue.

2. Benefits should be measured by consumer willingness to pay for the goods or services being provided, which is not necessarily the market price; and

3. Costs should be measured in terms of opportunity costs of what society gives up when it moves a resource from one use to another use.

CONCLUSION

This Court should hold that PIA is no longer the sole standard of quantification of a federal reserved water right for an agricultural Indian reservation. In its place, the Court should adopt a quantification standard which meets the minimal needs of the primary purpose of the reservation while providing the Indian people living on the reservation a moderate living. Such a standard is consistent with the decisions of this Court and recognizes that in water short stream systems as presently exist in most western states the established rights of water users under State law should be respected. If this Court retains the concept of PIA or some form thereof, the lower courts should be instructed to determine the economic feasibility of an Indian water project in the context of all costs and all benefits whether they accrue on or off the reservation.

Respectfully submitted,

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Respondents.

On Writ Of Certiorari To The Supreme Court Of Wyoming

BRIEF AMICUS CURIAE OF THE STATE OF CALIFORNIA AND THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA IN SUPPORT OF PETITIONER

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On Writ Of Certiorari To The Supreme Court Of Wyoming

BRIEF AMICUS CURIAE OF THE STATE OF CALIFORNIA AND THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA IN SUPPORT OF PETITIONER

I. INTRODUCTION

The State of California and The Metropolitan Water District of Southern California ("Metropolitan") submit this brief amicus curiae in support of petitioner State of Wyoming.[1] Although California and Metropolitan also support the position set forth in the ami-

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[1] Letters of consent to Metropolitan from petitioner State of Wyoming and respondents the United States and the Northern Arapaho and Shoshone Indian Tribes are on file with the Clerk.

cus curiae brief of the States of Arizona, *et al.*, that it is inappropriate to apply the "practicably irrigable acreage" measurement standard to the needs of the Indian Tribes of the Wind River Indian Reservation, they are submitting this separate brief because of their unique perspectives on the issue before the Court.

California has a strong interet in seeing that the water needs of the Indian tribes within the State are determined by a reasonable quantification standard consistent with the economically efficient allocation of scarce water resources.

Metropolitan is a public agency of the State of California. It imports water to the Southern California coastal plain and wholesales that water to its twenty-seven member public agencies in an area stretching from Ventura County to the Mexican border and encompassing over one-half the population of the state. A major portion of Metropolitan's water is obtained from the Colorado River pursuant to contracts with the Secretary of the Interior for the storage and delivery of Colorado River water from Lake Mead issued pursuant to the Boulder Canyon Project Act (43 U.S.C. §617 *et seq*). California and Metropolitan were defendants in *Arizona v. California*, 373 U.S. 546 (1963) ("*Arizona I*"), and its sequel, *Arizona v. California*, 460 U.S. 605 (1983) ("*Arizona II*"). *Arizona I* established the "practicably irrigable acreage" standard as the measure of federally reserved water rights to the waters of the mainstream of the lower Colorado River for five Indian reservations—the Colorado River, Fort Mohave, Yuma, Chemehuevi and Cocopah. The Chemehuevi and portions of all but the Cocopah reservation are located in California. As a

result of the paramount priorities of the reservations and its junior priority vis-a-vis other California Colorado River contractors, uses by those four Indian reservations in California reduce the amount of California's Colorado River entitlement available to Metropolitan. Because Metropolitan is currently dependent for part of its Colorado River supply on unused Colorado River Basin water that may be subject to claims by Indian tribes, it has a vital interest in seeing a more reasonable measure of Indian water rights than "practicably irrigable acreage" applied to other reservations in the Basin.

Arizona II involved an effort by the United States and three of the mainstream Indian Tribes to increase their allocations under the decree in *Arizona I*. California, Metropolitan and the other State Party defendants successfully resisted that effort. As a result of the Court's decision in *Arizona II* with regard to certain boundary disputes on the Colorado River, Fort Mohave and Yuma reservations, California and Metropolitan have been attempting to obtain a judicial resolution of those disputes, which has been frustrated to date by the United States and the Tribes. One aspect of those disputes is currently pending before this Court. *California v. United States*, No. 87-1165 (argued November 28, 1988).

II. SUMMARY OF THE ARGUMENT

This Court's adoption in *Arizona I* of Special Master Simon H. Rifkind's report and recommendation ("Report") that the reserved water rights of the five mainstream Indian reservations should be measured by the practicably irrigable acreage on each reservation was a departure from the measure of the "reasonable needs of the Indians" originally employed in

Winters v. United States, 207 U.S. 564 (1908), and applied for 55 years by other federal courts. The measurement issue was not fully developed by the parties or carefully considered by the Court in *Arizona I* because of the magnitude of the other dominant issues in that case. The primary objective for adopting the practicably irrigable acreage measure, *i.e.*, to provide certainty to (1) the Secretary of the Interior in delivering water to those reservations to be served under the Boulder Canyon Project Act and (2) the lower Colorado River mainstream contractors, has not been achieved. Unique circumstances produced the "practicably irrigable acreage" measure in *Arizona I*. However, it is unfair and unworkable and should not automatically be applied to the Wind River Indian Reservation or any other Indian reservations in the West.

III. ARGUMENT

A. Prior to *Arizona I* no court had measured the "reasonable needs of the Indians" by all practicably irrigable acreage on the reservation.

Before Special Master Rifkind in *Arizona I* the United States relied solely on four cases to support its claim that the measure of the water rights for the 25 Indian reservations in the Lower Colorado River Basin should be enough water to irrigate all of the practicably irrigable acreage on those reservations: *Winters, supra*; *Conrad Investment Co. v. United States*, 161 F. 829 (9th Cir. 1908); *Skeem v. United States*, 273 F. 93 (9th Cir. 1921); and *United States v. Ahtanum Irr. Dist.*, 236 F.2d 321 (9th Cir. 1956).[2]

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[2] Brief in Support of Proposed Findings of Fact and Conclusions Law of the United States of America (April 1, 1959) at 29.

In their briefs before the Special Master the California defendants (hereafter "California") demonstrated that those cases did not support the United States' claim, and showed that they had generally measured the Indians' needs by providing enough water to irrigate the maximum amount of acreage with a history of actual irrigation.[3] Consequently, California proposed allocations to the mainstream reservations in California based on the maximum amount of acreage historically irrigated on the reservations, either by Indians or non-Indians, except for the Yuma reservation for which it proposed the full magnitude of that reservation's entitlement under the state law appropriative water right under which it was being served.[4] It summarized its proposal as follows:[5]

> We do not ask a decree which would deprive any Indian or Indian reservation either of water which has been appropriated for an existing project, or water which is being used, even without proof of compliance with state law. On the other hand, we do not see in *Arizona v. California* an appropriate occasion to secure from an over-appropriated water supply, a decree which provides a

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[3] Brief of the California Defendants To Accompany Their Proposed Findings of Fact and Conclusions of Law (April 1, 1959) ("Calif. Opening Brief") at 191-95; Response of the California Defendants to Brief in Support of Proposed Findings of Fact and Conclusions of Law of the United States of America (June 11, 1959) ("Calif. Response") at 115-17.

[4] California Proposed Findings of Fact and Conclusions of Law (April 1, 1959) ("Calif. Findings") at Calif. Finding 13D:104, p. XIII-18; and Calif. Conclusion 13D:296, p. XIII-29.

[5] Calif. Opening Brief at 195.

> water right for every Indian acre that a Government soil classification analysis undertaken for purposes of this case has discovered to be irrigable. Water is too scarce and too precious to be set aside for anyone—Indian or non-Indian—on a when, as, and if needed basis.

B. The issue of the measure of the *Winters* rights for the Lower Colorado River mainstream Indian reservations was not fully presented or carefully considered in *Arizona I* because of the magnitude of the other issues in the case.

The Special Master's Report in *Arizona I* advised the Court that its "summary description of the various controversies involved in this case indicates that the action is far from being the traditional equitable apportionment suit" and that it did not present "a single, relatively narrow issue", but rather "a complex of interstate lawsuits." (Report at 6).

The trial before the Special Master in *Arizona I* lasted over two years, during which 106 witnesses were heard whose testimony produced a transcript of some 22,500 pages and thousands of exhibits. In addition, depositions of 234 witnesses in the Arizona-New Mexico dispute on the Gila River produced a transcript of 3742 pages. Based on that record the five Lower Colorado River Basin States of Arizona, California, Nevada, New Mexico and Utah submitted some 3862 pages of proposed findings of fact, conclusions of law and supporting briefs on a wide variety of issues. (Report at 3). However, of the over 2000 pages of briefs, only about 100 were devoted to the United States' claims of *Winters* reserved water rights for the Lower Basin reservations and a small

fraction of that amount to the measure of any such rights.

In his Draft Report of May 5, 1960 ("D. Rep."), the Special Master held that it was unnecessary "to adjudicate the rights or priorities of Indian Reservations diverting water from the Lower Basin tributaries, except for the Gila River." (D. Rep. at 222). With respect to the Gila River System Indian reservations, the Special Master also found it unnecessary to adjudicate any rights on wholly intrastate tributaries of the Gila River. (*Id.* at 294). As to its interstate tributaries, the United States claimed rights on only three reservations on the Gila River proper—the Gila River, San Carlos and Gila Bend reservations. The United States conceded that the rights of the Gila River and San Carlos reservations were governed by the long standing "Gila Decree". As to the Gila Bend reservation, the Special Master concluded that because of its geographical location and an already adequate supply from groundwater sources, "no reasonable purpose can be served in an equitable apportionment by allocating water to the Reservation at the expense of present New Mexico uses." (*Id.* at 295).

However, the Special Master found it necessary to adjudicate the mainstream reservation rights "in order that the Secretary may know how much water he may release [from Hoover Dam and the mainstream works below] for consumption on each Indian Reservation" and because the Indian claims were "of such great magnitude that failure to adjudicate them would leave a cloud on the legal availability of substantial amounts of mainstream water for use by non-Indian projects." (*Id.* at 223). He then sustained the

United States' claims as to the source and measure of their water rights. (*Id.* at 221-33). Having found the requisite federal power to reserve water for the reservations and the implied Congressional and executive intent to do so (*id.* at 224-27), the Special Master also concluded that the amount of water reserved was not limited to the needs of the Indian population resident on a reservation when it was created, nor to the acreage being irrigated at the time of its creation, but that it looked to the Indians' future requirements. (*Id.* at 227-28). Finally, he determined that such "future needs of the Indians" should encompass "sufficient water to irrigate all of the practicably irrigable lands in a Reservation and to supply related stock and domestic uses" (hereafter "PIA"). (*Id.* at 229).

With respect to California's and Arizona's arguments that no prior cases had so defined the reasonable future needs of an Indian reservation in such an expansive fashion, the Special Master declined to utilize the approach of the earlier cases (*id.* at 231-32, emphasis added):

> Furthermore, whether it is ever possible accurately to predict the future needs of an Indian Reservation, it is clearly not possible in this case where the energy of the parties has been devoted to a great many complex and important issues quite apart from those relating to the Indians. *Whatever might be possible in a case involving solely the issue of the reserved rights of a single Indian Reservation*, it would not be possible to predict future Reservation needs in this litigation.

He justified his selection of the PIA measure on the need "to provide certainty for both the United States and non-Indian users" (*id.* at 232), which had been the sole reason offered for adjudicating the mainstream reservation rights at all. It was the Special Master's view that the PIA measure would eliminate the uncertainty which he believed would flow from adopting "an open-end decree" under which "each Reservation may divert at any particular time all the water reasonably necessary for its agricultural and related uses as against those who appropriated water subsequent to its establishment." (*Id.* at 230-31). The Special Master's concern was that "such a limitless claim would place all junior water rights in jeopardy of the uncertain and the unknowable." (*Id.*)

Only California and Arizona challenged the Special Master's Indian water rights' recommendations in their written comments and oral argument on the draft report. (Report at 3, note 11a). The Special Master conceded during oral argument that his mainstream Indian reservation recommendations went beyond *Winters* and its progeny up to that time.[6] However, the only significant change which the Special Master made in the draft report's treatment of Indian water rights was to add an introductory state-

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[6] MR. WILMER [Arizona counsel]: . . . We believe that Winters is misread, your Honor. We believe that the implications of the Winters case are not as broad or as far reaching as your Honor has carried them in this particular . . .

THE MASTER: I am inclined to agree with you. Like all things, I think this is a branch on the tree. I think that is true. • • • All I can say is I think this is down the thread of the doctrine or stream as it is moving.

Tr. 22,960-61.

ment to that part of his report dealing with the measure of such rights stating that the issue was "sharply debated and many conflicting views have been advanced." (Compare D. Rep. at 229 with Report at 262). This addition suggests that the Special Master intended to emphasize the controversial nature of the PIA standard for the Court, since the rest of his decision on Indian water rights leaves no doubt that he felt that he was on very firm ground on the other elements of his recommendation.

Exceptions were filed by all parties to various portions of the Special Master's report. Neither Nevada nor Utah filed exceptions to his treatment of Indian claims, apparently because there are no Indian reservations in the Utah portion of the Lower Colorado River Basin and Nevada contains only a relatively small portion of the Fort Mojave Indian Reservation. New Mexico expressed its disagreement in principle with the Report's application of the *Winters* doctrine and its extension to other kinds of federal reservations, asserting that "application of these doctrines is generally contrary to the efficient development and use of the water resources of the arid West."[7] However, it did not take exception to the specific manner in which the implied reservation theory was applied to the equitable apportionment on the Gila River system inasmuch as it recognized an existing judicial decree and declined to disrupt existing uses in New Mexico for the benefit of the distant, downstream Gila Bend Reservation. (See page 7 *supra*.).

California and Arizona both excepted to the Report's treatment of Indian water rights. However,

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[7] New Mexico Exceptions (February 27, 1961) at 2.

California noted that it would not brief the issue because (1) the quantities of water in dispute in California were small and (2) all Indian uses were to be chargeable to the state where made.[8] Because the principal impact of the Indian allocations from the mainstream would therefore fall on Arizona and might jeopardize the permanent water supply for the Central Arizona Project which Arizona sought in its suit (Report at 30-31), California made the strategic choice to concentrate its efforts in challenging the interstate allocation recommended by the Special Master and not dilute them by mounting an attack on principle against the Indian allocations.

Arizona was thus left to wage a lone battle against the Special Master's application of the *Winters* doctrine, particularly his decision to measure the Indian rights by PIA. Without in any way intending to detract from the Arizona effort, and with perfect 20/20 hindsight, Arizona appears to have devoted an undue portion of its argument to the constitutional and intent issues underlying the Special Master's recommendation,[9] issues on which he appeared to be on strongest ground, rather than focusing on his PIA recommendation. Arizona's concession that "an open-end decree which would leave the reserved amount uncertain and subject to fluctuation is neither desirable nor necessary" was similarly unfortunate.[10]

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[8] California Exceptions (February 27, 1961) at 25. It also excepted to the Special Master's resolution of a disputed portion of the boundary of the Colorado River Indian Reservation in California. *Id.*

[9] Opening Brief for Arizona (May 22, 1961) at 121-53.

[10] *Id.* at 155.

In any event, the Indian water rights issues became submerged in the other major interstate issues presented to the Court. Of some 1469 pages of briefs presented to the Court, only 103 in the United States and Arizona briefs dealt with the Indian water rights issue. Of those pages, only 49 dealt with the PIA standard. Similarly, out of 16 hours of oral argument and 6 hours of reargument it appears that only 64 pages of the 858 pages of transcript dealt with Indian water rights issues and only 15 pages were directed to PIA. This limited treatment of PIA received a similar response in the Court's decision, which .s-posed of the PIA issue in a single short paragraph (373 U.S. at 600-01):

> We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations. Arizona, on the other hand, contends that the quantity of water reserved should be measured by the Indians' "reasonably foreseeable needs," which, in fact, means by the number of Indians. How many Indians there will be and what their future uses will be can only be guessed. We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage. The various acreages of irrigable land which the Master found to be on the

different reservations we find to be reasonable.

Consequently, the Court approved the Special Master's recommended allocation to the five mainstream reservations of 905,496 acre-feet of diversions for 135,636 acres of practicably irrigable acreage (Report at 350-51), even though the maximum annual irrigated acreage on those reservations had never exceeded 36,000 acres.[11]

The limited attention given by the parties and the Court to the PIA measure for the five Indian reservations in *Arizona I* should be contrasted with the extensive attention given to the issues of the nature and extent of federal reserved water rights for a single national monument in *Cappaert v. United States*, 426 U.S. 128 (1976), and a single national forest in *United States v. New Mexico*, 438 U.S. 696 (1978), both of which had substantially less impact on the affected States in terms of the "gallon-for-gallon" reduction[12] of the water supply legally available for their non-Indian water users than did the PIA decision.

C. The PIA measure has not produced the certainty on the lower Colorado River mainstream that it was intended to promote.

Although the PIA measure was adopted primarily because it would allegedly provide more certainty to the Secretary of the Interior and non-Indian water users on the lower Colorado River than would an open

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[11] Calif. Findings 4C:104, 4D:103, 13D:104, 14C:108, 18E:104 and 18F:104.

[12] *United States v. New Mexico*, 438 U.S. 696, 705 (1978).

end decree permitting a Tribe to expand its needs as they developed, it has not done so. Indeed the concept is fraught with inherent uncertainty. Whether lands are "practicably irrigable" depends basically on whether (1) soils are suitable for agriculture, (2) water can be applied in a technically feasible manner, and (3) the costs and revenues associated with the agricultural pursuit, if it is for other than subsistence, make it economically feasible. Not only are these elements subject to reasonable disagreement at any given point in time, but they are constantly in flux as a result of changing soil suitability standards, improving irrigation technology and practice, fluctuating economic conditions, and changing standards for determining the economic feasibility of water projects.

The foregoing uncertainty generated by adoption of the PIA measure in *Arizona I* is no better illustrated than by its own aftermath in *Arizona II*. Although the latter case involved important legal issues about the scope of the *Arizona I* decision, almost all of the seven months of trial, involving some 7300 pages of testimony and several hundred exhibits, were devoted to whether the so-called "boundary lands" and "omitted lands" at issue were "practicably irrigable". (Report of Special Master Elbert P. Tuttle (February 22, 1982) at 5-6.) Similarly, almost two-thirds (pages 89-277) of the Special Master's 315 page report was directed at trying to define and implement the PIA measurement standard. Adverting to the decision in *Arizona I*, Special Master Tuttle noted that "[t]he parties agree that neither the Special Master nor the Court defined the phrase 'practicably irrigable' " and that "many parties have presented different definitions of that phrase." (*Id.* at 93). After reviewing the

differing views of the parties and the proceedings before Special Master Rifkind, Special Master Tuttle concluded that the phrase "very nearly means 'economically feasible' ". (*Id.* at 94).

With that determination he embarked on a long odyssey into such disputes between the United States and the State Parties as whether any applicable benefit-cost analysis should include a profit margin on the benefit side of the equation (*id.* at 99-100), whether the moisture-holding capacity of certain "sandy lands" was high enough to qualify them as arable (*id.* at 126-32), what the "expected" crop yields and production costs on such lands might be (*id.* at 134-45), whether certain lands contained too much gravel and cobbles (large rocks) to be arable (*id.* at 145-58), and what the capital, indirect, operation and maintenance, and power costs of a hypothetical future irrigation system might be (*id.* at 165-80).

In addition to those disputes between the State Parties and the United States, the Tribes' independent claims presented additional issues as to the suitability of the cash crops which might be produced on the lands in question. The disputes centered on "the correctness of the prices and yields used by the Tribes' experts" with respect to hypothetical production of pistachios, almonds, figs and table grapes. (*Id.* at 197). The Special Master's task was made more difficult in this regard because only grapes had "a tangible history of production in the immediate vicinity of any of the Reservations, and even that history is not very extensive." (*Id.* at 197-98). That exercise consumed 40 pages of his report. (*Id.* at 198-239). One cannot review this part of the Special Master's report without a strong sense of the utter unreality and futility

associated with an attempt to predict the economic feasibility of future hypothetical Indian irrigation projects. However, the basis of the Court's decision in *Arizona II* made it unnecessary to address any of the thorny issues of economic feasibility. 460 U.S. at 640-41.

The PIA standard adopted in *Arizona I* has also presented great uncertainty by generating three major Indian reservation boundary disputes on the lower Colorado River. Before Special Master Rifkind in *Arizona I*, California pointed out that the United States' PIA proposal had engendered unnecessary boundary disputes with regard to the Fort Mohave and Colorado River reservations:[13]

> Unless the implied reservation which the United States would create for "the needs of the Indians" works in behalf of absentee Indians who have never manifested any need, intention, or ability to use water, or unless the water "appurtenant" to Indian land is measured in the absence of any such need or any plan to put water to use, the boundary disputes with the United States on the Colorado River and Fort Mohave reservations are wholly immaterial. They affect land which has no Indian population and no irrigation or other use of water by or on behalf of Indians. There is no occasion to decide these boundary questions except for the gratuitous injection by the United States into the collision between Arizona and California of the unrealistic contention that "irrigable" acreage is

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[13] Calif. Response at 127.

> the test of the quantum of water needed by Indians, existent or nonexistent. Either boundary dispute would present a major lawsuit in itself.

California's prophecy has been fulfilled, inasmuch as not only do the Fort Mojave and Colorado River reservation boundary disputes remain unresolved after 25 years, but a new boundary dispute has been generated on the Fort Yuma reservation, obviously as a result of the perceived opportunity for an increase in that reservation's *Arizona I* allocation as a result of the adoption of the PIA decision.[14] *Arizona II*, 460 U.S. at 628-41; *California v. United States*, U.S. Supreme Court No. 87-1165 (oral argument held November 28, 1988). Those three boundary disputes have generated substantial uncertainty for Metropolitan as it attempts to forecast the magnitude of the imminent shortages it faces and for which alternative supplies must be found. In a recent decision the California Water Resources Control Board recognized that Metropolitan had a substantial present need for additional supplies of water and noted that the full magnitude

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[14] In *Arizona I* the United States presented a claim for the Fort Yuma Reservation based on a boundary that neither California nor Arizona challenged. However, after *Arizona I* established that the reservation's right was to be measured by PIA, the Interior Department Solicitor subsequently overruled three prior Solicitor's opinions and redetermined the reservation boundary to increase its acreage by about 25,000 acres. The following day the Justice Department filed a motion with this Court to reopen the decree in *Arizona I* to increase the Fort Yuma Reservation allocation based on the newly added PIA, a claim that was ultimately rejected on procedural grounds in *Arizona II*. 460 U.S. at 632-33, 636.

of its shortage was uncertain because of possible increased uses by Indian tribes:[15]

> "As the result of wet conditions on the Colorado River since 1983, MWD has been able to divert close to the 1.3 million acre-foot capacity of its Colorado River aqueduct in each of the last five years. . . . Due to the development of the Central Arizona Project and other factors, however, the quantity of Colorado River water available for diversion by MWD on a dependable basis will be restricted to the quantity available under its fourth priority right of 550,000 acre-feet per annum. This quantity is reduced further by approximately 30,000 acre-feet per annum due to current levels of use by other holders of present perfected rights. *There is a possibility of additional reductions in the quantity of water available to MWD due to increased use by Indian tribes.* . . . The Central Arizona Project began deliveries in 1985 and is expected to utilize its full apportionment in about 1992. . . . Without the development of additional supplies, the record indicates that MWD faces a potential system-wide shortfall during dry periods of 560,000 acre-feet per annum by the year 2000, increasing to 980,000 acre-feet per annum by 2010."

Thus, as a practical matter the PIA standard has not eliminated uncertainty as hoped for by the Special

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[15] *In the Matter of Waste and Unreasonable Use of Water By Imperial Irrigation District* (September 7, 1988) at 10. (Emphasis added, record citations omitted).

Master. Metropolitan and other junior non-Indian users on the Lower Colorado River mainstream, such as the Central Arizona Water Conservation District which serves the burgeoning Phoenix and Tucson metropolitan areas, still face substantial uncertainty, inasmuch as the limited permanent water supply available from the Colorado River requires them to rely on the unused portions of the large senior allocations to the Indians. This reliance essentially is no different than if the Court had given the Tribes a firm allocation of enough water to supply their maximum historic uses (as California had argued before Special Master Rifkind) and then entered an open-end decree permitting the Tribes to increase those quantities if and when their needs developed. The "true" PIA on each reservation would then serve as a practical limit on future increased use because neither the Tribes nor their possible non-Indian lessees would irrigate reservation lands unless it was truly economically feasible to do so. Thus, *actual* Indian needs, government policies, and market factors supporting agricultural production necessary to support a "moderate standard of living"[16] for the Tribes would replace the kind of fruitless contest between soil specialists, agricultural economists and other experts as to the economic feasibility of *hypothetical* future agricultural development that took place in *Arizona II* and in the Big Horn River decision under review in this case.

Unfortunately, the merits of an open-end decree with a minimum firm allocation measured by maxi-

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[16] *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 686 (1979).

mum historic uses were not carefully considered in *Arizona I*. The Special Master raised *ex parte* and evaluated the possibility of a simple open-end decree only superficially. Neither the United States nor Arizona seriously addressed the implications of such an approach after California abandoned the chase, and the Court did not even mention, let alone evaluate it. Whether such an approach or other possible measurement standards might have adequately provided for the reasonable future needs of the mainstream Indian Tribes while minimizing curtailment of uses by existing and planned non-Indian projects remains unexplored.

IV. CONCLUSION

The PIA standard adopted by the Court in *Arizona I*, even though applied to only five of the 25 Indian reservations for which the United States asserted *Winters* claims in that case, broke new ground in the application of the *Winters* doctrine and was the most controversial aspect of the Special Master's Indian water rights recommendations. However, because it did not adversely impact Nevada, Utah and New Mexico, those States did not contest it. Although it did adversely affect California, the impact was minimal compared to the impact of the major interstate allocation recommendation of the Special Master, leading California to abandon active opposition to the Indian recommendations in briefs and oral argument before this Court. Consequently, Arizona shouldered the entire burden for the five States on this issue (in addition to concentrating its presentation on supporting the Special Master's recommended interstate allocation which was of critical importance to it) and did not focus its efforts on demonstrating the inva-

lidity and serious adverse impact of the PIA measure on it or the other western States.

The Special Master's questionable rationale for his departure from the established standards for measuring the reasonable needs of an Indian reservation with a *Winters* right was not subjected to adequate testing by the State Parties or this Court. The result was that the PIA issue was decided almost by default. The "certainty" objective that the Special Master and the Court sought to achieve has not been realized on the mainstream of the Lower Colorado River. Indeed the PIA standard has engendered uncertainty and the waste of resources in litigation over disputed reservation boundaries and overreaching by the United States and the tribes encouraged by the enticements of the PIA standard. The well-intentioned, but mistaken, rationale that produced the PIA standard on the mainstream of the Lower Colorado River in the unique circumstances of *Arizona I* should not be extended automatically to the Wind River Indian Reservation, or indeed to any other Indian reservations in the West. The Court should return to the approach to measuring *Winters* rights that had been applied for half a century before the Court abandoned it in *Arizona I* on the mainstream Indian reservations for reasons it felt necessary for proper administration of the Boulder Canyon Project Act.

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Supreme Court of the United States

October Term, 1988

STATE OF WYOMING,
Petitioner,

v.

UNITED STATES OF AMERICA, SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, et al.,
Respondents.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF WYOMING

BRIEF OF AMICUS CURIAE SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT IN SUPPORT OF THE STATE OF WYOMING

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No. 88-309

IN THE

Supreme Court of the United States

October Term, 1988

STATE OF WYOMING,

Petitioner,

v.

UNITED STATES OF AMERICA, SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

BRIEF OF AMICUS CURIAE SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT IN SUPPORT OF THE STATE OF WYOMING

INTEREST OF AMICUS CURIAE

Amicus curiae Salt River Project Agricultural Improvement and Power District, hereinafter referred to as "the District," is a political subdivision of the State of Arizona, organized pursuant to ARIZ. REV. STAT. ANN. §§ 48-2301 to 48-2475.[1] By virtue of various contracts, the District and the Salt River Valley Water Users' Association operate the Salt River Project, a federal reclamation project authorized and constructed under the authority of the Reclamation Act of 1902, 32 Stat. 388 (codified as amended in scattered sections of 43 U.S.C.).

[1]Because the District is a political subdivision of the State of Arizona and this brief is sponsored by the authorized law officer of the District, consent to filing this brief was neither sought nor required under Rule 36.4, Rules of the Supreme Court of the United States.

The Salt River Project facilities impound the waters of the Salt River and the Verde River, tributaries of the Gila River, for storage and delivery to municipal, industrial and agricultural water users in the Salt River Valley in central Arizona. The Project is comprised of approximately 248,000 acres of land, 71,000 of which are currently in agricultural production. The remaining 177,000 acres include most of the metropolitan Phoenix area, where more than 1.8 million people presently reside. The water used on those acres serves primarily municipal, industrial and domestic purposes. Current projections indicate that the Salt River Project lands will be almost entirely urbanized by 2010.[2]

The District is a claimant in two major water rights adjudications pending in Arizona courts — the Gila River Adjudication, covering the central and southern portions of the state,[3] and the Little Colorado River Adjudication, covering the northern part of the state. The number of claims in these adjudications totals 60,850 in the Gila Adjudication and 10,858 in the Little Colorado Adjudication.[4] Without question, the most extensive claims in both of these adjudications have been advanced by or on behalf of fourteen Indian tribes. In the Gila Adjudication, for example, twelve Indian tribes, or the United States acting on their behalf, have claimed in excess of 3.3 million acre-feet annually of the flow of the Gila River and its tributaries.[5]

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[2]*See Ball v. James*, 451 U.S. 355 (1981), for an extended discussion of the Salt River Project.

[3]This adjudication is pending in the Maricopa County Superior Court. The jurisdictional issues arising from this case were presented to this Court in *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, *reh'g denied*, 464 U.S. 874 (1983).

[4]*See* records of Arizona Department of Water Resources, as of July 1, 1988.

[5]*See* claim of the United States on behalf of the Fort Apache Indian Tribe, No. 39-07-12168; claims of San Carlos and Tonto Apache Indian tribes, Nos. 39-07-12676 and 39-05-50058; claim of Fort McDowell

Similarly, in the Little Colorado Adjudication, the Hopi and Navajo Indian tribes have claimed more than 380,000 acre-feet annually from the surface flow of the Little Colorado River Basin.[6]

In grave contrast to the amounts of water claimed by the United States and the tribes under the reserved rights doctrine, the relatively meager amount of water available to satisfy these claims, not to mention the claims of other existing water users, is insufficient by several orders of magnitude. Because of the arid climate existing throughout most of Arizona, in conjunction with extensive economic development in Central Arizona, particularly in the Phoenix and Tucson areas, "[v]irtually all surface water has been appropriated."[7] Diversions from the Gila River in the

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Indian Community, No. 39-05-50060; claim of Camp Verde Indian Tribe, No. 39-05-59952; claim of United States on behalf of the Yavapai-Prescott Tribe, No. 39-05-54011; claims of the United States on behalf of the Salt River Pima-Maricopa Indian Community, Nos. 39-05-54028 and 39-L8-35088; claim of the United States on behalf of the Hualapai Indian Tribe, No. 39-05-54027; claims of the Gila River Indian Community, Nos. 39-L8-37360 and 39-11-05478; claim of the United States on behalf of the Gila Bend Indian Tribe, No. 39-L8-35090; claim of the United States on behalf of the Maricopa Ak Chin Indian Tribe, No. 39-L8-35089; claims of the United States on behalf of the Tohono O'Odham Indian Tribe, No. 39-L8-35091 (Florence Village), No. 39-09-74336 (Schuk Toak), No. 39-09-74335 (San Xavier), and No. 39-09-74333 (Papago Indian Community); and claim of the United States on behalf of the Pascua Yaqui Tribe, No. 39-09-74334. All claim numbers have been recorded by the Arizona Department of Water Resources. These amounts do not include claims for amounts necessary to fill new reservoirs or claims for the development and use of substantial amounts of ground water.

[6]*See* claim of the Navajo Indian Tribe, No. 39-03-91442; claim of the Hopi Indian Tribe, No. 39-03-91443. Both claim numbers have been recorded by the Arizona Department of Water Resources. These amounts do not include claims for amounts necessary to fill new reservoirs or claims for the development and use of substantial amounts of ground water.

[7]United States Geological Survey, Water Supply Paper No. 2300, *National Water Summary 1985 — Hydrologic Events and Surface Water Re-*

1984 water year, for example, totaled 1,317,000 acre-feet, representing "the entire flow from the basin."[8] With regard to the Little Colorado River, present uses of the river have overwhelmed the water supply of 179,000 acre-feet annually,[9] and, as a result, "the river has no flow at times each year."[10]

The above statistics starkly illustrate the difficulties presented by the water rights claims asserted by the United States and the tribes, which are based almost completely upon the "practicably irrigable acreage" standard, adopted by this Court in *Arizona v. California*, 373 U.S. 546 (1963) (hereinafter *Arizona I*), for the reserved rights at issue in that case.[11] Putting aside for a moment the water rights claims of non-Indian irrigators, industries and municipalities, the United States' and the tribes' claims are grossly in excess of the total available water supply. Moreover, because most Indian reservations in Arizona were created a few years prior to the development of extensive surface water use by non-Indians, the water rights associated with these reservations may be assigned dates of priority which are senior to those of most non-Indian claimants. As a result, these claimants may find themselves waiting in line

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sources, at 145. *See Report of Simon H. Rifkind*, Special Master, *Arizona v. California*, No. 8 Original, Dec. 5, 1960 (hereinafter *Rifkind Report*), finding of fact no. 10, at 337 ("The Gila River, San Francisco River, and San Simon Creek are overappropriated, supply being insufficient to satisfy existing needs.").

[8]United States Geological Survey Paper, *supra* note 7, at 146.

[9]This amount is taken from an estimate by the United States Department of Agriculture, Soil Conservation Service, of the average annual flow of the Little Colorado River at Cameron Station, Arizona. *See* Soil Conservation Service, U.S. Dep't of Agriculture, *Report on Water Use in the Little Colorado River Basin*, at 5-17 (Dec. 1981).

[10]United States Geological Survey Paper, *supra* note 7, at 146.

[11]Indeed, over 94% of the total amount of water claimed by the tribes is based upon the "PIA" standard of quantification. *See* claims of the tribes, *supra* notes 5 and 6.

behind the insatiable demands of the tribes, with no water left to meet even a fraction of their needs.

For these reasons, the District and other non-Indian claimants in the Gila and Little Colorado adjudications are vitally interested in this Court's decision regarding the unbridled use of the practicably irrigable acreage standard for quantifying the water rights of Indian tribes. To the extent that such water is not necessary to meet the tribes' actual needs, and in the face of the manifest needs of non-Indian appropriators, an award to the tribes in an amount necessary to sustain all of the practicably irrigable acreage on their reservations, not to mention uses of water for other purposes, would be both improvident and unjust.

PARTY SUPPORTED

The District supports the position of the petitioner, State of Wyoming, that in the absence of any demonstrated necessity for additional water to fulfill reservation purposes and in the presence of substantial state water rights long in use on the reservation, a reserved water right may not be implied for all practicably irrigable lands within a reservation set aside for a specific tribe.

SUMMARY OF ARGUMENT

Quantification of federal reserved water rights for Indian reservations should promote tribal self-determination and economic independence by awarding the amount of water necessary for optimal utilization of a particular tribe's resources, with sensitivity to potential impacts on existing users and regional economies.[12] Tribal self-determination

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[12]The concept of optimal utilization of a tribe's natural and human resources does not refer to maximum economic output on Indian reservations, but rather to an attainable mix of uses, based upon that tribe's particular circumstances, which achieves the highest and best socioeconomic benefits for reservation Indians, consistent with cultural traditions

and economic independence, which are primary goals of Indian tribes and federal policy, are closely interrelated. Quantification decisions should therefore be closely linked to economic activities best suited for achieving tribal self-sufficiency, but be formulated with equity and realism.

No absolute standard of quantification of federal reserved rights for Indians is universally appropriate for all Indian reservations. Tribal potential for achieving economic independence depends upon a reservation's natural resources, location, climate and numerous other factors which vary widely from one reservation to another. The off-reservation impacts of quantification decisions also vary considerably from one area to another, depending upon local and regional conditions. Water awards must be carefully tailored to fit all of the circumstances relating to a particular reservation.

Practicably irrigable acreage ("PIA") is generally an inappropriate standard of quantification, particularly for Indian reservations claiming water from over-appropriated stream systems. PIA is a mechanical yardstick which awards water based solely upon the economic feasibility of a single activity, giving no consideration to actual needs of reservation residents or impacts on others.

Instead of searching for a universally applicable but mechanically applied measure of Indian water, this Court should establish broad guidelines for quantifying federal reserved rights, delegating to the lower courts in the first instance the task of applying the principles in particular fact situations. Quantification decisions which provide for optimal reservation development while minimizing impacts on established uses require careful consideration of competing factors, a process requiring thorough familiarity with the

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and values and with wise use of scarce natural resources. Comprehensive plans for developing tribal resources have been prepared by or on behalf of a number of Indian tribes. *See, e.g.*, The San Carlos Apache Tribe, *Overall Economic Development Plan* (1978); The Planning Support Group, Bureau of Indian Affairs, Report No. 255 (rev. 1977).

facts, honed by adversarial proceedings which generally have immense stakes for all parties. The competing considerations include a reservation's specific purpose, if discernible; the reservation's population and other circumstances relating to actual needs of its residents; the particular tribe's resources and other conditions bearing upon the potential for generating jobs and income on the reservation; other sources of water for the reservation; the tribe's cultural values and traditions; efficient use of a scarce and precious resource; and impacts on existing users and regional economies dependent upon a fully appropriated stream system.

Compared to Indian water awards based upon the PIA standard, the approach urged by this amicus curiae will generally produce greater economic benefits for reservation residents, yet require less water and therefore have less effect on existing users.[13] Our approach will also result in greater progress toward the goals of tribal self-sufficiency and self-determination.

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[13]Modern agriculture does little to generate employment and income for Indians. Jorgensen, *A Century of Political Economic Effects on American Indian Society, 1880-1980*, 6 JOURNAL OF ETHNIC STUDIES, No. 3, at 49 (1978); Bee, THE POLITICS OF AMERICAN INDIAN POLICY 28 (1982). Irrigated agriculture supports .005 employees per acre foot of water. U.S. Dep't of Agriculture, *Irrigation in the United States* (1985); U.S. Bureau of the Census, Census of Agriculture, Selected States (1984). One acre foot of water per year can support two to sixty employees in manufacturing industries, and even greater employment in other nonagricultural industries. Institute of Water Resources, Water Resources Support Center, U.S. Army Corps of Engineers, *IWR-Main, Water Forecasting System, Version 5.1, User's Manual and System Description*, Appendix A (June 1988). In other words, from 400 to 12,000 nonagricultural employees could be supported by the amount of water needed to generate one agricultural job.

Similarly, there are "wide variations in the value of water in different uses". National Research Council, National Academy of Sciences, *Water and Choice in the Colorado Basin: An Example of Alternatives in Water Management*, Publication 1689, at 72 (1968). In Arizona, for instance, various nonagricultural sectors generate personal income "ranging from 20 to nearly 1,000 times as large," per acre-foot of water, "as even high-value intensive cropping." *Id.*

ARGUMENT

I.

QUANTIFICATION OF FEDERAL RESERVED WATER RIGHTS SHOULD BE GEARED TOWARD ATTAINING TRIBAL SELF-DETERMINATION AND ECONOMIC INDEPENDENCE WHILE MINIMIZING ADVERSE EFFECTS ON EXISTING NON-INDIAN USES.

Both Congress and this Court have recognized tribal self-determination as a primary goal of federal Indian policy. *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845 (1985). Indian tribes are also firmly committed to self-determination as one of their main objectives. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983).

The objective of furthering tribal self-determination includes the "overriding goal of encouraging 'tribal self-sufficiency and economic development.' " *Mescalero Apache Tribe*, 462 U.S. at 335 (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980)). Self-determination and economic independence are inexorably linked:

> Without a stronger economic base, the residents of Indian reservations are left dependent on the Federal government for their income and support. The well being of tribal members will be subject to the shifting political trends in Federal budgetary and Indian policy. The history of Indian affairs also suggests that a state of dependency could have adverse consequences for the self esteem, motivation, level of entrepreneurship, and other elements of the social environment of many reservations.[14]

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[14]U.S. Department of the Interior, *Report of the Task Force on Indian Economic Development* 32 (1986) (hereinafter *Task Force Report*).

True tribal self-determination can only occur when a tribe has achieved economic independence. *See Task Force Report, supra* note 14, at 78, 90-91. Thus, attaining the goal of tribal self-determination requires successful economic development on Indian reservations.

A primary emphasis of any plan for reservation development must be economic activities which generate employment and income on the reservation. Virtually every reservation in the western United States suffers from high unemployment, pervasive poverty and heavy dependence on federal handouts. *See Task Force Report, supra* note 14, at 44-50.[15] The federal government's payments to reservation Indians from 1982-1985 totaled approximately three billion dollars each year, not including social security, food stamps and state welfare payments made with federal dollars. *Id.* at 87-90.

Both sound economic principles and sound public policy dictate that quantification of federal reserved water rights should be designed to promote the goals of tribal self-determination and economic independence. In quantifying the water rights of any particular Indian reservation, one of the principal criteria should be the amount of water required to achieve optimal development of that reservation's resources. The concept of optimality contemplates a realistic, objective assessment of the mix of uses which would be most appropriate for a particular tribe, considering its needs, resources and opportunities. An expected benefit/cost ratio greater than one would be a necessary — but insufficient — condition for proceeding with a particular use. Other considerations must include the number of jobs and amount of income for reservation Indians expected to

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[15]As of 1980, unemployment levels on Indian reservations were more than twice the overall national rate; only 36% of reservation Indian males between the ages of 30 and 54 were employed, compared with 89% of all U.S. males in the same age category; and 41% of reservation Indians were living below the poverty level. *Id.* at 45, 49.

be generated by the proposed activity,[16] whether comparable benefits would flow from less water-intensive uses,[17] and the compatibility of the proposed use with tribal desires and cultural values.[18] Water awards which are linked to optimal utilization will fulfill the general intent of Congress in establishing Indian reservations, an intent to provide a homeland for Indians, reserving sufficient water "to provide the Indians with a livelihood — that is to say, a moderate living." *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 686 (1979) (hereinafter *Fishing Vessel*).[19]

Quantification decisions cannot be made by turning a blind eye to existing, competing economies; they must be

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[16]*See supra* note 13.

[17]*See supra* note 13.

[18]It is questionable whether any economic endeavor on an Indian reservation could be successful if it were incompatible with the value systems and goals of the tribal culture. Some Indian scholars assert that Indians hold distinctly different values regarding wealth, family and land than do non-Indians. *See* DuBray, *American Indian Values: Critical Factor in Case Work*, 66 SOCIAL CASE WORK, No. 1, at 30-37 (1985); Jarvenpa, *The Political Economy and Political Ethnicity of American Indian Adaptions and Identities*, in 8 ETHNIC AND RACIAL STUDIES, No. 1, at 29-48 (1985); A. Sorkin, THE URBAN AMERICAN INDIAN 125-136 (1978). While non-Indian goals include maximization of economic returns and accumulation of wealth for the individual, tribes often place greater importance upon such goals as extending tribal employment opportunities. *See* Sorkin, *supra*, at 125; Bean, *Morongo Indian Reservation: A Century of Adaptive Strategies*, in AMERICAN INDIAN ECONOMIC DEVELOPMENT 160 (S. Stanley ed. 1978). A recent study of three reservations concluded that small-scale tribally operated economic activity of a labor-intensive nature may ultimately be the successful mode of economic development. *See* Vinje, *Cultural Values and Economic Development on Reservations*, in AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY 155, 172 (V. Deloria, Jr. ed. 1985).

[19]The Court has made clear that the amount of water required to achieve a moderate living serves as a cap on any quantification of a federal reserved water right. *See Fishing Vessel*, 443 U.S. at 686; *United States v. New Mexico*, 438 U.S. 696, 699-700 (1978).

made with sensitivity to the impact on established uses. In quantifying reserved water rights for national forests, this Court stated:

> When . . . a river is fully appropriated, federal reserved water rights will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators. This reality has not escaped the attention of Congress and must be weighed in determining what, if any, water Congress reserved for use in the national forests.

United States v. New Mexico, 438 U.S. at 705. Justice Powell's dissent agreed that "the implied-reservation doctrine should be applied with sensitivity to its impact upon those who have obtained water rights under state law and to Congress' general policy of deference to state water law." *Id.* at 718 (Powell, J., dissenting in part).

The Court's observations are directly applicable to the general adjudications pending in Arizona; the Indian reserved rights claims far exceed the flow of the rivers, which for many decades have been fully appropriated by Indians and non-Indians. A large award to Indian tribes could cause extensive uncompensated losses for existing users, wreck havoc on the regional economy, and preclude future growth.[20] Significantly, because only 25% of all Indians live

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[20]It might be possible, in the short run, to partially compensate for the loss of water awarded to Indian tribes by pumping an increased quantity of groundwater. However, in many areas of Arizona withdrawal of groundwater "is greatly in excess of the safe annual yield," ARIZ. REV. STAT. ANN. § 45-401.A (1987), necessitating a strict program for limiting pumping in order to achieve and maintain a balance between the amount withdrawn and the amount of recharge. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 45-437, 45-452, 45-561 to 45-569 (1987 & Supp. 1988). A strong groundwater management statute was required by the federal government as a condition for proceeding with the Central Arizona Project, a multibillion dollar system for transporting water from the Colorado River to thirsty Indian and non-Indian users in central and

on reservations,[21] many Indians would be among the group adversely affected by tribal water awards. Moreover, the victims of a large award for some tribes could easily include Indian reservations with more recent priority dates.

The purpose of the quantification process is not to award the maximum amount of water which could be put to beneficial use on reservation land in carrying out one or more forms of development, nor is it to precipitate a massive transfer of wealth from existing users to reservation Indians. Rather, the objective of Indian water rights quantification decisions should be to promote the goal of tribal self-determination, yet provide for finality and certainty, by awarding the fixed amount of water required for realistic activities which generate the greatest economic and social benefits for reservation Indians, tempered by tribal values and a desire to minimize off-reservation impacts.

II.

INDIAN WATER AWARDS SHOULD PERMIT OPTIMAL UTILIZATION OF A PARTICULAR TRIBE'S RESOURCES, WITH SENSITIVITY TO OFF-RESERVATION IMPACTS

A. No Universal Standard of Quantification Is Appropriate; Quantification Decisions Must Be Carefully Tailored to Fit Individual Reservations.

Indian reservations reflect tremendous diversity of resources and a wide disparity in their potential for making progress toward achieving economic independence. *See Task Force Report, supra* note 14, at 79, 99-128. In Arizona, for instance, some reservations are endowed with timber or coal, some have mountains or other features attractive to

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southern Arizona. *See* Kyl, *The 1980 Arizona Groundwater Management Act: From Inception to Current Constitutional Challenge*, 53 U.COLO. L.REV. 471, 480 (1982).

[21] *Task Force Report, supra* note 14, at 36, citing 1980 U.S. Census.

tourists, and some have arable land. Some are located in remote areas and are plagued by harsh climates, while others are adjacent to thriving metropolitan areas providing ready markets for tribal goods and services.

Any realistic plan for economic development of a particular Indian reservation must focus upon that reservation's natural resources, location, climate, population and other particularized circumstances. Because of the broad diversity among reservations, suitable economic development plans will also vary considerably from one reservation to another. Logging and tourism may be the predominant economic activities best suited to one reservation, while manufacturing and commercial development may be far more appropriate for another tribe. Existing uses already reflect, in many instances, the differing resources and opportunities of various reservations.[22]

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[22]*See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, __, 107 S.Ct. 1083, 1086 (1987) (tribal bingo enterprises); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 327 (resort complex, timber, hunting and fishing); *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 138 (1980) (timber operations, "accounting for over 90% of the tribe's annual profits"); *Fishing Vessel*, 443 U.S. at 664 (1979) (commercial fishing); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 146 (1973) (cross-country ski trails); *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 731 F.2d 597, 598 (9th Cir. 1984), *aff'd*, 471 U.S. 195 (1985)(uranium, oil and gas); *Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072, 1073 (9th Cir.), *cert. denied*, 464 U.S. 1017 (1983) (lease of city lot for use as automobile dealership); *White Mountain Apache Tribe v. State of Arizona, Department of Game and Fish*, 649 F.2d 1274, 1277 (9th Cir. 1981) (sale of "tribal hunting and fishing licenses, ... food, lodging and tourist goods and services"); *Peabody Coal Co. v. The Navajo Tribe*, No. CIV 88-0931 PCT RGS (D.Ariz.) (coal on Navajo and Hopi reservations). The Salt River Pima-Maricopa Indian Community, which adjoins Scottsdale, Arizona, owns and operates one of the largest sand and gravel operations in the United States and one of two cement plants in Arizona. *See also Task Force Report, supra* note 14, at 134-137, 141-142, 146-155; *Indian Tribes, Incorporated*, NEWSWEEK, Dec. 5, 1988, at 40-41; *The Industrial Reservation*, NATION'S BUSINESS, Aug. 1981, at 54-58.

We are not suggesting that with proper planning, reservations can suddenly and magically become economically self-sufficient, lowering the unemployment and poverty rates to the national averages and eliminating the need for federal subsidies. Most Indians were placed on lands that "were not considered to be located in the most desirable area of the Nation." *Arizona I*, 373 U.S. at 598. Some reservations, having very limited natural resources and a poor location, have little opportunity to achieve economic independence. Much better prospects for making substantial progress toward self-sufficiency are presented by tribes which, perhaps due more to happenstance than federal planning, have extensive minerals or other natural resources and are located near metropolitan areas. The point is that any tribe's economic development plan should seek to achieve the mix of uses which is most appropriate for that tribe in view of its particular circumstances.

The water quantification process, in turn, must determine the amount of water which would be required by a particular tribe in order to implement a realistic, detailed plan for optimal utilization of its resources. Indian water awards should not be based upon an assumption that more is better, but rather should be closely tailored to fit the particular resources and all other circumstances of individual reservations.

In determining the quantity of water required to achieve optimal utilization of a particular reservation's resources, consideration must necessarily be given to the tribe's actual needs. Water is not an end in itself, but merely a means to develop tribal resources in order to further the goals of self-determination and economic independence by providing reservation Indians with a livelihood. Quantification decisions which ignore a tribe's actual needs will inevitably miss the target of achieving optimal utilization of the tribe's resources.

Prior decisions of this Court have identified actual need as an integral component of reserved rights analysis. *Cap-*

paert v. United States, 426 U.S. 128 (1976), emphasized that the quantification of reserved water rights must be limited to "that amount of water necessary to fulfill the purpose of the reservation, no more," and must be "tailored ... to minimal need". *Id.* at 141. Similarly, the Court stated in *Fishing Vessel* that water awards to Indians are to assure "that the Indians' reasonable livelihood needs would be met." 443 U.S. at 685.

We agree with the State of Wyoming that it is inappropriate to award a quantity of water which exceeds the amount required to satisfy tribal needs. Since the objective of federal policy is to meet the reasonable livelihood needs of reservation Indians, water awards must necessarily be closely tied to the size and circumstances of the reservation population. The reserved rights doctrine is premised upon the assumption that in creating Indian reservations Congress intended to reserve sufficient unappropriated water "to make the reservation livable." *Arizona I*, 373 U.S. at 599.

We also agree with Wyoming that prior congressional actions must be considered in assessing a reservation's needs and the intended source of water for filling those needs. The record in this case reflects that Congress provided for tribal acquisition of water rights under state law for more than 70% of the lands for which federal reserved water rights were awarded in the courts below. *See* Wyo. Exs. WRIR PW-2, SR-5. It also reflects that Congress rebuffed requests to create an express reserved water right for the Wind River Reservation. *See* Wyo. Exs. WRIR I&P 225, 234-235, 14.[23]

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[23]An analogous situation is presented in one of the adjudications to which this amicus is a party. The Gila River Indian Reservation participates in the San Carlos Irrigation Project, *see* 43 Stat. 475 (1924), and has also received an allocation of Colorado River water from the Central Arizona Project, *see* 48 Fed. Reg. 12446-12447 (1983). The Salt River Pima-Maricopa Indian Community holds a decreed right under state law, *see Hurley v. Abbott* (Ariz. Territorial Court, Cause No. 4564, decree filed

Courts should examine congressional treatment of a particular reservation to determine whether provision of water from another source was intended to be a partial satisfaction of tribal reserved rights rather than to supplement the amount originally reserved. At a minimum, all of a tribe's sources of water must be considered in determining whether a tribe's needs have been met and what additional quantity, if any, is needed to permit optimal utilization of the tribe's resources.

B. Potential Off-Reservation Impacts of Indian Water Awards Depend Upon Local and Regional Conditions.

A quantification decision's potential off-reservation impacts depend upon a variety of circumstances, such as the size of the award, the rate at which the tribe puts additional water to use, the availability of alternative water sources, the priorities of off-reservation water users, and the complexity of the regional economy. The award of Colorado River water to Arizona Indian tribes in *Arizona I* did not displace any existing uses in Arizona, and therefore did not interfere with reasonable, investment-backed expectations.[24] The Gila River and Little Colorado River adjudica-

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March 10, 1910); has a CAP allocation, *see* 48 Fed. Reg. 12446-12447; and receives water from the Salt River Project's Bartlett Reservoir on the Verde River pursuant to 39 Stat. 130 (1916). *See Rifkind Report, supra* note 7, at 43.

[24]The decree entered in *Arizona v. California* allocated 2,800,000 acre-feet to Arizona and awarded approximately 800,000 acre-feet of water to Indian reservation land located within Arizona, with the Indian water to be deducted from Arizona's share. *See Arizona v. California*, 376 U.S. 340, 342-345 (1964); *Rifkind Report, supra* note 7, at 267-269, 272, 279, 281-282. The special master found that total diversions from the Colorado River by Arizona users, including Indian reservations, were 1,239,140 acre-feet, representing less than one-half of Arizona's share. *Rifkind Report, supra*, at 127. It was physically impossible, until more than 20 years after *Arizona v. California*, to deliver the bulk of Arizona's allocation to potential users. *See* 48 Fed.Reg. 12446, 12450 (1983). Those waters were not even allocated by the Secretary of the Interior until 1983. *Id.* at 12446-12452.

tions, to which this amicus is a party, involve an entirely different situation. Many of the claimants in the Gila River adjudication, for instance, are successors to parties who received decreed rights under state law in 1910 after five years of litigation. *See* note 23, *supra*. Many of the uses on which those rights are based have been made continuously for 100 years.

Because the river systems in central Arizona are already grossly overappropriated, every drop of additional water awarded to Indian tribes for new uses will be taken from existing users. The last group of existing Arizona users to be directly affected by Indian quantification decisions would be farmers, who generally hold the water rights with the earliest priority dates under state law. Large numbers of municipal, industrial and commercial users would be among the first groups to be affected, because of their more junior priority.

C. Quantification Decisions Require Careful Consideration of Competing Interests on a Case-by-Case Basis.

In quantifying Indian water rights under the federal reserved water rights doctrine, first annouced by this Court in *Winters v. United States*, 207 U.S. 564 (1908), extreme caution and sensitivity must be exercised in order to avoid disastrous disruption of complex water law regimes as well as unconscionable frustration of long-established property expectations. The federal government actively encouraged and supported settlement and development of the semi-arid West, enacting laws, appropriating money and pursuing other policies which necessarily involved appropriation of all available water.[25] It would be illogical and unfair to force

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[25]Priority of actual beneficial usage is made the measure of water rights in all the significant Nineteenth Century federal legislation on water rights. *See, e.g.*, Act of July 26, 1866, ch. 262, 14 Stat. 251; Act of July 9, 1870, ch. 235, 16 Stat. 217; Act of March 3, 1877, ch. 107 § 1, 19 Stat. 377, 43 U.S.C. § 321 (Desert Lands Act); Reclamation Act of 1902, 32 Stat. 390.

existing appropriators to bear a disproportionate share of the cost of fulfilling the national responsibility to provide Indian reservations with additional water.

The need to carefully tailor each quantification decision to fit the particularized circumstances of a given reservation, with utmost sensitivity to off-reservation impacts, precludes a rigid, universal standard of quantification. Quantification decisions which provide for optimal development of a particular reservation's resources while minimizing effects on established uses require Solomonic balancing of a myriad of factors. Agonizing choices must be made. No test defined for resolving the pending case should be rotely applied to all pending and future adjudications.

The preferred approach is for the court to establish broad guidelines for quantifying federal reserved rights, permitting special masters and trial judges to apply those principles to specific facts, developed in adversarial proceedings. If Indian water rights are allegedly abridged by lower courts, this Court has already agreed to provide "a particularized and exacting scrutiny". *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 571 (1983).[26]

D. Practicably Irrigable Acreage Is Generally an Inappropriate Standard of Quantification.

In using practicably irrigable acreage ("PIA") as the standard for quantification in *Arizona v. California*, the Court concluded that "the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage." 373 U.S. at 601. However, the Court

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[26]For years, Congress and the executive branch have wrestled with the problem of how to provide adequate water supplies to Indian tribes while minimizing off-reservation impacts. The Central Arizona Project and San Carlos project, *supra* note 23, are examples of federal programs designed to provide water to both groups, without disrupting existing economies. The Secretary of the Interior's allocation of Colorado River water, and the priority scheme for handling shortages, also reflect an effort to be sensitive to off-reservation impacts. *See* 48 Fed.Reg. 12446-12452.

did not purport to adopt PIA as a universal standard applicable to all Indian reservations. *See id.* at 600-601. More importantly, the PIA test suffers from a number of serious deficiencies which should preclude its usage as a general standard of quantification.

PIA is a mechanical standard which focuses solely upon economic feasibility of irrigated agriculture on particular tribal parcels, ignoring the actual needs of reservation residents. As noted by the Wyoming Supreme Court in the case before this Court, the determination is based upon arability, engineering feasibility and economics. *See* 753 P.2d at 101-105. Accordingly, if a particular reservation has a favorable climate and a large expanse of flat, fertile, well-drained land bordering a river, it will receive a large PIA award, regardless of the population of the reservation or any other considerations relating to actual need. The size of a PIA award can span the spectrum from *no* water at all to *all* of the water in the river system.[27] Because the PIA standard is unrelated to the needs of reservation residents, it is virtually guaranteed to award either too much water or too little water. Either result frustrates federal policy and creates serious inequities.

A second major failing of the PIA standard is that it promotes an activity — tribal irrigated agriculture — which is contrary to modern needs and realities. Modern agriculture already suffers from severe overproduction.[28] Expansion of tribal irrigated agriculture would require massive

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[27]In a recent New Mexico decision, the court awarded no water under the PIA standard, concluding that the United States and Mescalero Apache Tribe failed to meet their burden of proof. *State of New Mexico ex rel. Reynolds v. Lewis*, Chaves County, New Mexico, Cause Nos. 20294 and 22600, consolidated. The PIA standard also induces claimants of reserved rights to assert inflated claims premised upon unrealistic farming scenarios not intended to be implemented.

[28]"The U.S. agricultural sector throughout the 1980s has been beset by problems of insufficient demand and excess supply. In order to try to hold up farm prices, the Federal government has poured many billions of

federal appropriations for storage and diversion facilities, canals, land preparation and other prerequisites to profitable farming. Increased Indian agriculture would also constitute an inefficient use of a scarce resource. There are more important needs for water, both on the reservation and off, than increased amounts of irrigated agriculture.[29]

In addition to being water intensive (*see* note 13, *supra*), modern irrigated agriculture does little to generate employment and income for Indians.[30] As a result, it fails to solve the most pressing economic problems of reservation Indians and offers little progress toward the goals of self-sufficiency and self-determination. "In short, agriculture offers little promise of making any substantial new contributions over the next few years to Indian economic development." *Task Force Report, supra* note 14, at 120.

In many instances, agriculture is also contrary to tribal desires and aspirations.[31] As previously discussed, reservation development should be consistent with tribal values and wishes.[32]

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dollars into supporting these prices." *Task Force Report, supra* note 14, at 120.

[29]"The U.S. as a whole today needs less land in food production, not more." *Task Force Report, supra* note 14, at 120.

[30]*See* note 13, *supra*. The trend of reservation employment is away from irrigated agriculture. The percentage of Indians employed in agriculture declined from approximately 68% in 1940 to 8% in 1980, while employment in non-farming occupations increased from 32% to 92% during that time period. A. Sorkin, *The Economic Basis of Indian Life*, ANNALS, AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 4 (March 1978); Haberfeld and Musnick, *Indian Economic Development Resources: A Question of Use, Organization and Control as Much as One of Quantity*, ECONOMIC DEVELOPMENT AND LAW CENTER REPORT 11 (Jan./Feb. 1980).

[31]Sorkin, *supra* note 18, at 2; Burrill, *The Establishment of Ranching on the Osage Indian Reservation*, 62 GEOGRAPHICAL REVIEW, No. 4, at 524-543 (1972).

[32]*See supra* notes 12, 18.

Another serious shortcoming of the PIA standard is that at best, irrigated agriculture is only one component of a realistic plan for achieving tribal economic independence. Agricultural development alone is simply incapable of generating the needed economic activity required for producing a significant improvement of economic well-being on Indian reservations.[33]

The PIA standard is also insensitive to impacts on existing users. It makes no effort to minimize those effects by focusing on forms of development which generate the most economic benefits for the least amount of water.

CONCLUSION

Although practicably irrigable acreage may have been an appropriate standard for quantifying the federal reserved water rights of the Indian reservations involved in *Arizona v. California*, it would generally be improvident and unjust to apply it to other reservations today. The PIA standard ignores the actual needs of reservation Indians and of the national economy, focuses on a water-intensive activity which results in little progress toward tribal self-sufficiency, and is insensitive to consequences for other users.

As an alternative to the PIA approach, courts should tailor each quantification decision to fit the reservation's resources and other circumstances, basing an Indian water award upon the mix of uses that is designed to provide the greatest socioeconomic benefits for reservation Indians

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[33]Haberfeld and Musnick, *supra* note 30, at 11.

while making wise use of a scarce resource and minimizing impacts on other users.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1988

STATE OF WYOMING,

Petitioner,

v.

UNITED STATES OF AMERICA, SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Wyoming

BRIEF OF AMICI CURIAE STATES OF ARIZONA, IDAHO, MONTANA, NEVADA, UTAH, AND WASHINGTON IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In the absence of any demonstrated necessity for additional water to fulfill reservation purposes and in the presence of substantial state water rights long in use on the Reservation, may a reserved water right be implied for all practicably irrigable lands within a Reservation set aside for a specific tribe?

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On Petition For A Writ Of Certiorari To The Supreme Court Of Wyoming

BRIEF OF AMICI CURIAE STATES OF ARIZONA, IDAHO, MONTANA, NEVADA, UTAH, AND WASHINGTON IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICI CURIAE

In Idaho a general adjudication of all rights to the use of water for that portion of the Snake River Basin located within the state of Idaho is being processed in state court. As part of this proceeding, the state district court will enter a decree quantifying all federal reserved water right claims, including those the federal government holds for Indian tribes. Three Indian reservations are within the

geographic boundaries of the adjudication, and two of the reservations will have significant claims for irrigated agricultural use. Thus, amici state of Idaho has a vital and continuing interest in issues involving the quantification of federal reserved water rights for Indians. More directly, Idaho is negotiating with the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation in the context of this litigation to quantify its federal reserved water right claims for agricultural use.[1] Since the Second Treaty of Fort Bridger of 1868, 15 Stat. 673, which created the Wind River Indian Reservation, applies also to the Fort Hall Indian Reservation, the outcome of this case will have a direct bearing on these negotiations.[2]

Since entry of the Court's decision in *Arizona v. California*, 373 U.S. 546 (1963), the amici state of Arizona has acquired extensive experience in quantifying Indian reserved water rights which may be valuable to this Court in considering application of the PIA standard to pending and future cases. Moreover, Arizona is now engaged in two general stream adjudications on the Gila

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[1] The United States and a group of private water users also participate in these negotiations.

[2] The Executive Order of June 14, 1867, 1 Kappler 835, created the Fort Hall Indian Reservation in southeastern Idaho. Article two of the Second Treaty of Fort Bridger of 1868 provided "whenever the Bannacks desire a reservation to be set apart for their use, or whenever the President of the United States shall deem it advisable for them to be put upon a reservation, he shall cause a suitable one to be selected for them." The Executive Order of July 30, 1869, 1 Kappler 838, designated the Fort Hall Indian Reservation as the reservation for the Bannocks.

and Little Colorado Rivers. The United States participates in these state court cases on behalf of 14 affected tribes asserting reserved right claims of very significant magnitude. *See Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545 (1983). Thus, Arizona has a vital and continuing interest in issues involving quantification of federal reserved water rights for Indian reservations.

The other amici states have Indian reservations within their borders. These amici are currently parties in litigation regarding the quantification of federal reserved water rights for agricultural irrigation use within Indian reservations. *See, e.g., State v. Acquavella*, Yakima County Superior Court No. 77-2-01484-5 – a general adjudication of the Yakima River basin system which includes the United States as a party claiming, among others, agricultural irrigation water rights relating to the Yakima Indian Reservation. These states have an interest in the outcome of this case because it may well establish the appropriate approach for quantification of implied federal reserved water rights for Indian reservations within these states.

SUMMARY OF ARGUMENT

The question before the Court is the appropriate standard for quantification of the implied reserved water right for agricultural purposes at the Wind River Indian Reservation. In *Winters v. United States*, 207 U.S. 564 (1908), this Court created the implied reservation of water doctrine for an agricultural Indian reservation. The

basis for this doctrine was the need of the Indian reservation for water to achieve its primary purpose of converting a nomadic people to a pastoral life that relied on agriculture for support. 207 U.S. at 576. In *Arizona v. California*, 373 U.S. 546 (1963), this Court affirmed a water right quantification for five agricultural Indian reservations in the lower Colorado River basin of Arizona, California, and Nevada based on a practicably irrigable acreage standard specially developed by the Court's special master for those reservations.[3]

This Court has recognized that federal reserved rights for water or for other natural resources inevitably displace persons who are not beneficiaries of the federal reserved right. Consequently, this Court in other federal reserved claims context has recently emphasized the need to be sensitive to this displacement and to recognize federal reserved rights only to the extent necessary to achieve the primary purposes of the federal reservation. In *Cappaert v. United States*, 426 U.S. 128 (1976) this Court praised the federal district court because it "tailored its injunction, very appropriately, to minimal need, curtailing pumping only to the extent necessary to preserve an adequate water level . . . " 426 U.S. at 141. The amici urge that this Court direct the Wyoming Supreme Court on remand to do the same thing – tailor the quantification of the implied reserved water right to needs at the WRIR.

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[3] In *Arizona v. California*, 460 U.S. 605 (1983), this Court discussed the PIA standard for five Indian reservations in Arizona, California, and Nevada and concluded that the prior litigation precluded reopening the Court's prior calculation of the amount of PIA. 460 U.S. at 625-626.

ARGUMENT

I.

THE JUDGMENT OF THE WYOMING SUPREME COURT INCORRECTLY QUANTIFIED THE IMPLIED RESERVED WATER RIGHT FOR THE WIND RIVER INDIAN RESERVATION BECAUSE THE COURT FAILED TO ANALYZE THE NEED OF THE RESERVATION FOR THE WATER

A. Introduction

This case raises the fundamental question of how to quantify a federal reserved water right for an Indian reservation. The Wyoming state courts awarded a reserved water right to the Shoshone and Northern Arapaho Tribes for all practicably irrigable acreage within the present boundaries of the Wind River Indian Reservation, hereinafter "WRIR," under the implied reservation of water doctrine. The federal reserved water right was quantified in the approximate amount of 500,000 acre-feet per annum, for the irrigation of some 100,000 acres with a priority as of 1868, the date of the treaty establishing the WRIR. 753 P.2d at 105-106, Pet. App. A, at 56a-58a. Pursuant to congressional directive in 1905, however, water rights for the irrigation of 145,000 acres of Indian lands had been obtained under state law, overlapping more than 70% of the lands for which the reserved right was subsequently granted. This overlap is inconsistent with this Court's past rulings that a reserved water right is limited to that amount minimally necessary to achieve the primary purposes of the reservation. If the decision of the Wyoming Supreme Court is allowed to stand, it will continue the confusion regarding the appropriate measure of a federal reserved water right and undermine the efforts of the amici states to resolve claims for reserved

water rights for Indian reservations within their respective states.

B. Decisions of this Court Hold that Federal Reserved Water Rights are Limited to the Minimal Amount of Water Necessary to Achieve the Primary Purposes of a Federal Reservation

In *Winters v. United States*, 207 U.S. 564 (1908), this Court held that the United States impliedly reserved a water right insofar as it was reasonably necessary to accomplish the agricultural purpose of an Indian reservation when the United States withdrew land from the public domain and reserved it for an Indian reservation. In determining necessity, this Court has indicated that the reserved water right is that amount minimally necessary to achieve the primary purposes of the reservation. In *Cappaert v. United States*, 426 U.S. 128 (1976), for example, this Court in concluding that a Proclamation establishing a National Monument under the American Antiquities Preservation Act of June 8, 1906, ch. 3060, 34 Stat. 225, 16 U.S.C. § 431, created a federal reserved water right for Devil's Hole stated: "The implied-reservation-of-water doctrine, however, reserves only that amount of water *necessary* to fulfill the purpose of the reservation, no more." 426 U.S. at 141 (emphasis added). The District Court then "tailored its injunction, very appropriately, *to minimal need*, curtailing pumping only to the extent necessary to preserve an adequate water level at Devil's Hole." *Id.*

As this Court, subsequently, recognized in *United States v. New Mexico*, 438 U.S. 696 (1978), limiting federal reserved water rights to minimal needs allows for the

reconciliation of the competing federal policies of protecting federal reservations and of deferring to state water law.

> Each time this Court has applied the "implied-reservation-of-water doctrine," it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated. . . .
>
> *This careful examination is required both because the reservation is implied, rather than expressed, and because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water.* Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law. . . .Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water.

438 U.S. at 700-702 (emphasis added) (citations and footnotes omitted). Thus, necessity is the basis and measure of a reserved water right because of the implied nature of the right and because of the long-standing national policy of deference to state water law.[4]

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[4] This deference began when Congress enacted section 9 of the Mining Act of July 26, 1866, ch. 262, 14 Stat. 251, 253, that recognized "rights to the use of water . . . acknowledged by the local customs, laws, and the decisions of courts" and continues to the present. *See California v. United States*, 438 U.S. 645 (1978). For a listing of 37 statutes recognizing the applicability of state water law, *see* Hearings on S. 1275 before the

(Continued on following page)

Furthermore, then Justice Rehnquist noted that "[i]n the arid parts of the West, . . . claims to water for use on federal reservations inescapably vie with other public and private claims for the limited quantities to be found in the rivers and streams." 438 U.S. at 699. As a practical matter, recognition of a federal reserved water right frequently causes "a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators." 438 U.S. at 705. By limiting federal reserved water rights to that amount minimally necessary to achieve the primary purposes of a federal reservation, the conflict between competing claimants to a limited water supply is reduced.

This Court has similarly limited tribal claims for other natural resources to that amount minimally necessary to provide a livelihood for the tribe. In the context of an express reservation in an Indian Treaty of a right to take anadromous fish that pass through tribal fishing grounds, for example, this Court stated:

> As in Arizona v California and its predecessor cases, *the central principle here must be that Indian treaty rights* to a natural resource that once was thoroughly and exclusively exploited by the Indians *secures so much as, but no more than, is necessary to provide the Indians with a livelihood – that is to say, a moderate living.*

Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 686 (1979) (emphasis added)

(Continued from previous page)

Subcomm. on Irrigation and Reclamation of Senate Committee on Interior and Insular Affairs, 88th Cong., 2d Sess. 302-310 (1964) (App. B, Supplementary Material submitted by Sen. Kuchel.)

Thus, although stated in different ways, this Court has characterized necessity in each case as the fundamental basis and measure of the federal reserved right to a natural resource in much the same manner as beneficial use is the basis and measure of an appropriative water right.[5]

C. The Wyoming Supreme Court Failed to Analyze the Need of the Wind River Indian Reservation for the Water

The Wyoming Supreme Court's analysis of the necessity for water at the WRIR is short. 753 P.2d at 100-101, Pet. App. A, at 47a. The court acknowledges the existence of a "needs test" from *Cappaert, New Mexico,* and the *Passenger Fishing Vessel* cases but then concludes that the certainty inherent in the PIA standard requires use of that quantification standard. 753 P.2d at 101, Pet. App. A, at 47a. The fallacy in this approach is the absence of a finding that equated the present and future needs of the Indians with the amount of water necessary to irrigate all the reservation's practicably irrigable acreage. In *Arizona v. California,* the Special Master "found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations." 373 U.S. at 600. Thus, the Court

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[5] Section 8 of the Reclamation Act of June 17, 1902, ch. 1093, 32 Stat. 388, 390, 43 U.S.C. § 372 incorporated a general provision of western water law that "beneficial use shall be the basis, the measure, and the limit of the right."

found that PIA equalled the minimal needs of the tribes. The absence of that finding for the WRIR resulted in the Wyoming courts undertaking a very inflexible, hypothetical PIA analysis not related to the needs of the WRIR for water.

II.

THE INFLEXIBLE, HYPOTHETICAL METHOD OF PIA ANALYSIS HAS PRODUCED UNREALISTIC CLAIMS

A. Introduction

The amici find the PIA methodology, while helpful in some instances in identifying a resource base that is susceptible to agricultural use, misses the mark in most instances with regard to quantifying the actual needs of a tribe. The unrealistic PIA claims are attributed to two factors.

First, PIA analysis focuses on land classification to the exclusion of an examination of existing water supplies. Because modern irrigation technology will permit irrigated agricultural production on lands that were previously not susceptible to irrigation, the total water needs of PIA lands far exceeds the natural water supply.

Second, under the PIA methodology, parties, instead of focusing on legitimate needs of the tribe, spend their time and money debating the viability of abstract irrigation projects that will never be developed. In general, tribes have little desire to develop extensive irrigation projects; yet, PIA allows tribes to maximize their implied reserved water right claim. Since PIA is based upon hypothetical projects there is an incentive to ignore real world constraints to further enhance claims. In many

instances, parties are led into a fantasy land of unrealistic discount rates and engineering schemes that defy the imagination. This subject is discussed more thoroughly in P. Sly, *Reserved Water Rights Settlement Manual* 101-105 (1988).

The amici recognize the legitimate needs of a tribe for water to develop their reservations. The PIA methodology, however, in most instances does not reflect tribal needs. Thus, performing a PIA analysis is a highly unproductive way of satisfying legitimate tribal needs and in most instances leads to controversy between the Indian and non-Indian communities.

B. The Experience in Arizona Demonstrates the Unrealistic Claims Produced by a PIA Analysis

Arizona has 20 Indian reservations covering 28% of the state's land area. Five of them are located on the main stream of the Colorado River while the remainder are distributed throughout the state, some on the lower reaches of its major interior drainages, others at the headwaters of these streams. The reservations provide homelands for tribes with varied and contrasting cultures. Some are traditional farmers, others have historically practiced very little agriculture.

In *Arizona v. California*, this Court found that tribal reserved rights included an amount of water reasonably necessary to irrigate all the reservation land which could "practicably" be made productive. The Court chose this formula instead of a measure based on present Indian population or projected need. When it was applied, the five tribes whose rights were determined in the case

received 34.3% of the water allotted to Arizona from the main stream of the Colorado River. While this was a large award, it was "new" water which had not previously been used in Arizona. Thus, new irrigated lands could be developed on the reservations without retiring existing lands from production. Full recognition of tribal claims did not require the "gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators," which this Court later recognized to be a consequence of applying the reserved right doctrine in an arid region. 438 U.S. at 705.[6]

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[6] Since application of the PIA standard in *Arizona v. California*, the reserved water rights have been determined for three additional Arizona reservations with an agricultural history predating European contact through litigation and settlement approved by Congress. The reservation lands were located within areas irrigated by the tribes at the time of American settlement. Water to supply the tribes will come primarily from groundwater pumping and from the "new" Colorado River supply being diverted into the state through the Central Arizona Project. Essentially, these settlements confirm to the tribes rights which were acknowledged to be theirs at the time the reservations were established and provide means to develop them. Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, Pub. L. 100-512, 102 Stat. 2549; Act of July 28, 1978, Pub. L. No. 95-328, 92 Stat. 409, as amended by Act of October 19, 1984, Pub. L. No. 98-530, 98 Stat. 2698 (Ak-Chin Indian Community); Southern Arizona Water Rights Settlement Act of 1982, Pub. L. No. 97-293, Title III, 96 Stat. 1274 (Papago Tribe). These settlements involved conflicting claims to ground water and arose not from general adjudications but from actions against the federal government for failure to protect and develop water resources and injunctive actions to restrain non-Indian pumping. Nevertheless, the settlements quantified all reserved water rights.

The two general adjudications now proceeding through state courts in Arizona[7] include large reserved right claims for tribal lands which may be irrigable but have no history of agricultural use. For example, in the *Gila Adjudication*, the Gila River Indian Community asserts a reserved water right of 1,599,252 acre-feet per annum based upon 266,542 irrigable acres on the reservation. Historically, maximum cultivation on this reservation, as reported by the Court of Claims, was 7,000 to 8,000 acres. *See Gila River Pima-Maricopa Indian Community v. United States*, 684 F.2d 852, 860-61 (Ct. Cl. 1982). The Court commented that this asserted reserved right alone exceeds the entire flow of the Gila River, except in peak flood years.[8] Upstream from this reservation, the

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[7] Arizona enacted legislation in 1979 providing new procedures for conducting several stream adjudications. Ariz. Rev. Stat. Ann. § 45-251 *et seq.* Under this law, two cases were commenced: *In Re: The General Adjudication Of All Rights To Use Water In The Gila River System And Source*, Maricopa County Superior Court No. W-1, W-2, W-3, W-4 (Consolidated); *In Re: The General Adjudication Of All Rights To Use Water In The Little Colorado River System And Source*, Apache County Superior Court No. 6417. The Gila River, with its tributaries drains the southern half of Arizona; while the Little Colorado, with its tributaries drains most of the northern half of the State.

[8] 684 F.2d at 864. The Court of Claims was considering a tribal claim against the United States for failure to protect and develop its water rights. It discussed but did not decide whether the reservation had been established for an agricultural purpose. To date, the purpose for establishing the Gila, San Carlos, Navajo and Hopi Reservations has not been determined. Tribal reserved right claims, for the most part, are based on the premise that these reservations were established for agriculture and should be measured by the amount of practicably irrigable acreage.

San Carlos Apache Tribe asserts a reserved right claim for an additional 571,842 acre-feet on behalf of the San Carlos Apache Indian Reservation. There are an additional eight tribes with unquantified claims against the Gila.[9]

In the *Little Colorado Adjudication*, the Navajo Tribe has filed a reserved right claim for 313,880 acre-feet, annually, of surface flow. The Hopi Tribe claims 81,850 acre-feet. The two tribes together make reserved right claims of 395,730 acre-feet against a source, the Little Colorado River, which has an average annual watershed production of only 388,650 acre-feet.[10]

These general adjudication claims resemble those of the Colorado River tribes in that water is demanded for previously undeveloped land. But, unlike tribal claims to the unallocated Colorado mainstream and the rights of the three interior tribes quantified after that decision,

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[9] Yavapai/Apache Camp Verde, Papago Florence Village, Fort Apache, Fort McDowell, Gila Bend, Hualapai, Tonto Apache, and Prescott-Yavapai. Information from Statement of Claimants on file with the Arizona Department of Water Resources.

[10] Total flow of the Little Colorado less the flow of Blue Spring, which is located close to the point where the Little Colorado empties into the Colorado River. U.S. Dep't of Agriculture, *Little Colorado Arizona-New Mexico Summary Report*, at 27, App. II at 575 (1981). The tribes expect "new" water to be created by an irrigation project requiring a dam and reservoir on the Little Colorado. However, the economic feasibility of such a proposal has not been established and Congress has not authorized its construction.

claims of the Gila River Pima, San Carlos Apache, Navajo and Hopi Tribes alone exceed the available supply. Even if all the water were allotted to the tribes by strict application of the doctrine of prior appropriation, the tribes would remain in conflict with each other on both the Gila and Little Colorado Rivers for a still inadequate source.

Arizona's experience suggests a clear need to refine the PIA standard in light of physical limitations which were not present on the Colorado River. In fact, the recent actions of one Arizona court illustrates some of the problems inherent in applying the existing PIA standard in a water-deficient drainage.

On September 9, 1988, the *Gila Adjudication* trial judge directed the Arizona Department of Water Resources, its technical adviser, to measure all Indian reserved right claims using PIA, stating his belief that such action was mandated by the holding in *Arizona v. California*, 460 U.S. 605 (1983). Many parties question this interpretation of the law which assumes, as a basis for applying the PIA measure, that all reservations were created for agricultural purposes. The trial court also has indicated that any determination of reserved rights cannot exceed the amount of water produced by the river system. While this seems a logical statement, no guidelines exist for applying it. For example, in Arizona, only surface water is allocated by the doctrine of prior appropriation. If Indian reserved water rights under federal law exceed the surface supply, the court must consider whether to satisfy them from the groundwater resource, in contravention of state law which protects groundwater users against prior appropriators. *Maricopa County Municipal Water Conservation District No. 1 v. Southwest*

Cotton Co., 39 Ariz. 65, 4 P.2d 369, *rehearing denied*, 39 Ariz. 367, 7 P.2d 254 (1932).

Assuming that tribal claims in excess of watershed production are established, Arizona courts must decide whether to cut off all non-Indian surface and certain undetermined groundwater users in favor of tribal rights, to apportion the inadequate supply in some equitable manner among competing claimants or to restrictively interpret the PIA measure in the presence of desert conditions where water will never be sufficient to irrigate all the otherwise arable land.

C. The Experience of Idaho in the Negotiations Regarding Implied Federal Reserved Water Rights at the Fort Hall Indian Reservation Demonstrates That the PIA Standard Produces Unreliable Results

The Shoshone-Bannock Tribes and Idaho began substantive discussions regarding the implied federal reserved water right for agricultural use at the Fort Hall Indian Reservation using the PIA methodology. Idaho soon found that small changes in underlying parameters used in the PIA analysis made dramatic changes in the amount of irrigable acres. For example, the parties did not agree on cropping patterns, discount rate, arable land, or engineering feasibility. In short, use of PIA proved to be divisive.

Two of the projects proposed for the Fort Hall Indian Reservation require a trans-mountain diversion of water through a tunnel to deliver water to the proposed project lands. The enormous capital costs of these projects were to be offset by benefits realized by growing carrots, a

specialty crop, and attaining yields on other crops that exceed those obtained by the non-Indian farmers in the same area.

The recent discussions have shifted to the total amount of water required to satisfy their claim and the means to provide that water without impact on existing non-Indian users. By shifting away from PIA the parties have been able to make progress. Yet, the lack of clarity regarding whether PIA is the sole means for quantifying a federal reserved water right for agricultural use on an Indian reservation continues to frustrate negotiations.

D. The Experience of Washington in Litigation Regarding Implied Federal Reserved Water Rights of the Spokane Tribe in Chamokane Creek Basin Demonstrates That the PIA Standard Produces Anomalous Results

Application of the PIA standard has also resulted in an anomalous quantification of a reserved water right in relation to the "general adjudication" of Chamokane Creek, a small tributary stream of the Spokane River, which flows through the semi-arid Spokane Indian Reservation of northeastern Washington State. *See United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984). The court there confirmed water rights to the Spokane Indian Tribe for both "instream" fishery rights of approximately twenty cubic feet per second and agricultural irrigation right for more than eight thousand acres (applying a strict PIA standard) based on the federal reserved rights doctrine. In addition, the court confirmed rights to numerous non-tribal member water users, including the United States, created primarily under state laws. The peculiarity of the

rights confirmed to the Tribe for irrigation use centers, in part, on the modest natural flow of Chamokane Creek. There is considerable doubt, if these senior priority rights are attempted to be exercised to its full extent, that irrigation of the eight-thousand acres could be accomplished due to natural flow limitations. Further, if such an exercise did take place, there would be no ability whatsoever to satisfy any of the equally senior priority "instream rights" also confirmed to the Tribe, not to mention any of the many junior priority water rights based on state law confirmed by the court that are held by non-tribal parties, including the United States. Further ironies of the reserved irrigation water right quantification by the court (following strictly the PIA standard with its non-need inquiry aspect) include the fact that very few of the eight thousand acres have either in the past or are presently being irrigated. In addition, it is of note that the Tribe stated to the court during trial that the Tribe had no intent to exercise in the future the quantified irrigation rights associated with the large remaining tract of unirrigated land. *United States v. Anderson*, No. 3643 (E.D. Wash. December 21, 1981) (Report and Recommendation of United States Magistrate Re Motion to Amend Memorandum Opinion and Order, and Judgment) (unpublished).

E. Clarification of the Implied Federal Reserved Water Right Quantification Standard Will Reduce Conflict Between Indian and Non-Indian Water Users

Any general stream adjudication requires several years to complete. Approximately, 145,000 individual

claims are projected for the Snake River Basin Adjudication in Idaho. There are 63,000 individual claims on file with the Arizona court in the Gila Adjudication, 11,000 in the Little Colorado. The adjudication process on these streams could easily continue another 10 years before entry of appealable decrees, and thereafter, the status of all water rights will remain unclear until the appellate process is completed. Based upon experience since 1963, the amici believe that quantification of tribal reserved right claims by negotiation and settlement has provided an effective and equitable alternative to protracted litigation. Early resolution removes the cloud of uncertainty over non-Indian rights and allows amici to plan and effectively manage their water resources. Early resolution for the tribes means the prospect of economic development. Yet, negotiations are being seriously impeded because the applicable law is so uncertain.

Direction from this Court concerning application of the PIA standard under the truly arid condition of the amici states seems appropriate at this time. In the amici's view, as the law exists today, lower courts cannot know, when evaluating tribal claims, whether they must inquire into the purpose for creating each reservation or if all are to be considered agriculturally based. They cannot know whether PIA is the sole measure of an Indian reserved right or whether this standard is only one consideration which might be relevant in an arid region where the streams do not generate enough water to irrigate all the land which can be made productive. Without guidance, pending adjudications may remain stalled in litigation and rights unquantified while legal argument over these issues consumes time and resources.

The amici believe that this Court could reduce the amount of existing tension between states and tribes and eliminate a large part of the litigation arising from federal Indian reserved water rights by providing a clear statement that water needs of an agricultural Indian reservation be quantified based upon need. The amici will suggest that necessity requires the balancing of many factors, one of which may be the use of PIA methodology.

III.

THIS COURT SHOULD DIRECT TRIAL COURTS TO FAIRLY AND EQUITABLY TAILOR THE IMPLIED RESERVED WATER RIGHT DETERMINATION FOR AGRICULTURAL INDIAN RESERVATIONS TO THE NEEDS OF AN INDIVIDUAL RESERVATION

The needs of an individual agricultural Indian Reservation may differ with locale; therefore, amici believe that PIA should not be the sole basis for determining an Indian reserved water right for an agricultural Indian reservation. Instead, trial courts should be directed to fairly and equitably tailor the implied reserved water rights based upon the needs of an individual agricultural Indian Reservation. Need is not an absolute concept. Thus, in determining need trial courts should examine a number of factors. For the WRIR the amici believe an examination of the following factors is required at a minimum: (1) the amount of water delivered to Indian lands pursuant to congressional or executive action, (2) the amount of irrigable acreage, (3) the water supply available for those needs, (4) the amount of land historically irrigated and (5) the amount of water necessary to provide a tribe a livelihood as an agricultural community.

This Court created the Winters doctrine to assure that an agricultural Indian reservation was not deprived of a needed water supply as a result of congressional or executive branch neglect. *Winters v. United States*, 207 U.S. 564 (1908). The Winters doctrine fulfills the United States' moral obligation to its Indian population. In many instances, however, Congress and the executive branch recognized the federal government's moral obligation to supply water for agricultural Indian reservations by constructing Indian irrigation projects. In those instances where Congress or the executive branch has provided water through an Indian irrigation project, it is inappropriate for a court to imply reserved water rights for lands served by the project.

Common features of Indian irrigation projects are storage reservoirs that store water during high flow periods and the nonirrigation season for use during low flow periods. Storage reservoirs for Indian irrigation projects provide several obvious benefits. First, reservoirs assure a dependable supply of water for project lands during drought and during the normally low flow period of late summer. Second, storage reservoirs reduce the need for the Indian irrigation projects to divert natural flow water that supplies non-Indian users. Thus, storage reservoirs satisfy the moral obligation of the federal government to provide a dependable water supply to the Indians while minimizing the impact on non-Indians.

In light of this congressional balancing of competing interests, this Court should not imply a federal reserved water right for project lands. Instead, a federal reserved water right should only be implied for lands for which it is shown that Congress or the executive branch did not

provide a water supply. A contrary holding would unsettle expectations of water users within the system and would wreak havoc on the state water law allocation doctrines in the western states.

The WRIR is an example of an agricultural Indian reservation where the United States undertook a massive irrigation project for the benefit of the Tribes. In the process, the United States acquired state water rights in accordance with a 1905 federal statute for that project. Act of March 3, 1905, ch. 1452, 33 Stat. 1016. Historically, water has been delivered to the WRIR under those state water rights for about eighty years. The requirement to deliver that water in accordance with those state water rights is a fact known to all water users since the initiation of the appropriation by the United States. If that water is suddenly transformed to an 1868 priority, the entire priority system on the river would be reshuffled and unnecessary adverse impacts on existing water users would result.

The bottom line for any court determining federal reserved water rights for agricultural Indian reservations should be the assurance of delivery of sufficient water to provide a tribe a moderate living as an agricultural community. 443 U.S. at 686. If a court can meet that goal and reduce the adverse impact on non-Indians, then a court should do so. Under the judgment of the Wyoming courts, the Shoshone and Northern Arapaho Tribes received a water supply far in excess of their need, as demonstrated by the recent agreement they entered with the State of Wyoming to forego the exercise of their right for a year in exchange for five million dollars. The practical effect of the judgment is that the non-Indians are

buying back water that they have historically used and which the tribes do not need. Such a result creates animosities between Indian and non-Indian communities and should be avoided.

The second factor, i.e., the amount of irrigable acreage, obviously provides a convenient starting place for analysis of lands not served by water under a state water right. However, the usefulness of an irrigable acreage analysis may be skewed any desired way by use of unjustified parameters in the analysis. The only justified parameter is one that is based on the real world.

The third factor provides the absolute cap on a federal reserved water right for an agricultural Indian reservation. A federal reserved water right can obviously be no better than the entire natural flow of the particular stream.

The fourth factor provides one measure of need for an agricultural Indian reservation. While amici recognize that many factors may influence the decision to develop for irrigation a parcel of land, sustained irrigation through good and bad times is the best evidence of irrigability of land.

The fifth factor is a direct implementation of the *Passenger Fishing Vessel* case that an allocation of a natural resource to an Indian tribe should be no greater than the amount necessary to provide a moderate living. 443 U.S. at 686.

In brief, this Court can materially assist the process of fairly quantifying federal reserved water rights for Indian reservations by telling lower courts they may look

beyond the rigid PIA formula enunciated in *Arizona v. California*. In amici's view, sole reliance on PIA to quantify federal reserved water rights will not produce consistent or equitable results in pending cases, despite its past successes. Instead, the trial courts should fairly and equitably tailor the implied reserved water rights based upon the needs of an individual agricultural Indian reservation.

CONCLUSION

For these reasons, this Court should reverse the Wyoming Supreme Court judgment and direct that fact finding occur to determine the need of the Wind River Indian Reservation for water.

RESPECTFULLY SUBMITTED this 9th day of March 1989.

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No. 88-309

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF WYOMING,
Petitioner,

v.

UNITED STATES OF AMERICA, SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

BRIEF OF THE CITY OF PHOENIX AS AMICUS CURIAE IN SUPPORT OF THE STATE OF WYOMING

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March 9, 1989

QUESTION PRESENTED

Whether the present and future water needs of the Shoshone Tribe and Northern Arapaho Tribe of the Wind River Indian Reservation are to be measured (1) by the Reservation's practicably irrigable acreage; (2) by the Reservation's practicably irrigable acreage modified by proof of tribal necessity; or (3) as Congress has mandated, by the amount of water actually put to use on Reservation lands?

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Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

BRIEF OF THE CITY OF PHOENIX AS AMICUS CURIAE IN SUPPORT OF THE STATE OF WYOMING

The City of Phoenix, a political subdivision of the State of Arizona, through its city attorney, files this brief amicus curiae in accordance with Rule 36 of the Court.

INTEREST OF THE AMICUS CURIAE

The City of Phoenix, a political subdivision of the State of Arizona, is party to a general stream adjudication pending in the Superior Court for Maricopa County in the State of Arizona. *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source,*

Nos. W-1, W-2, W-3 and W-4, Superior Court in and for Maricopa County, Arizona, hereinafter the "Gila River Stream Adjudication." The municipal, industrial and domestic water supplied by the City to its nearly one million inhabitants is in large part diverted from rivers subject to that Adjudication.

Indian tribes appearing in the Gila River Stream Adjudication, either on their own behalf or through the United States as their trustee, have claimed substantial federal reserved water rights. These rights are claimed for the San Carlos Apache Tribe, the Gila River Indian Community, the Tonto Apache Tribe, the Yavapai-Prescott Indian Community, the Salt River Pima-Maricopa Indian Community, the Fort McDowell Indian Community, the Camp Verde Yavapai-Apache Community, the White Mountain Apache Tribe and other tribes. The jurisdiction of the state court over these claims was largely confirmed in *Arizona v. San Carlos Apache Tribe of Arizona,* 463 U.S. 545 (1983).

The type of analysis used by the state court in Arizona to quantify the very substantial tribal claims to reserved water rights could have an enormous impact upon the rights of the City of Phoenix, and the approximately 22,000 other claimants who have filed nearly 65,000 separate claims to water in the Gila River Stream Adjudication.

This Court's review of the decision of the Supreme Court of Wyoming in the current proceeding may determine whether the quantification standard of practicably irrigable acreage is to be rigidly applied to tribal claims in the Gila River Stream Adjudication or considered in light of applicable Congressional acts and the individual circumstances of the particular tribes whose rights are there at issue.

SUMMARY OF ARGUMENT

In *Arizona v. California,* 373 U.S. 546 (1963) this Court held that a water right was reserved by implication for the present and future needs of the Indians who were to occupy certain federal lands along the Colorado River. With no indication from Congress as to the measure of the implied reservation of rights, this Court turned to and accepted the practicably irrigable acreage standard developed by the special master in those proceedings. *Arizona v. California, supra* at 600.

The measure of the water rights reserved for the Shoshone and Northern Arapaho Tribes occupying the Wind River Indian Reservation is, by contrast, specified in federal legislation. With the Act of March 3, 1905, 33 Stat. 1016, hereinafter "1905 Act," ratifying the Second McLaughlin Agreement, Congress exercised its plenary power over Indian affairs to require that the Reservation's reserved water rights be quantified in accordance with the laws of the State of Wyoming.

Wyoming, a prior appropriation state, measures a water right by actual beneficial use, not practicably irrigable acreage. Wyo. Const. art. VIII, § 3. The Shoshone and Northern Arapaho federal reserved rights should therefore be quantified as the amount of water the tribes put to actual beneficial use on the Wind River Indian Reservation under the laws of the State of Wyoming. Congress determined with the 1905 Act that such an amount, to be established by the diligence and interest of the tribes and their federal trustee, would satisfy the purpose for which the land was reserved.

ARGUMENT

The Wind River Indian Reservation was established by the Second Treaty of Fort Bridger, signed in 1868, ratified and proclaimed the following year. Treaty with the Eastern Band Shoshone and Bannock, 15 Stat. 673 (1868), hereinafter "the 1868 Treaty." Under the analysis employed by

this Court in *Winters v. United States*, 207 U.S. 564 (1908) and again in *Arizona v. California, supra at 600*, the 1868 Treaty implicitly reserved water rights for the Indians who would occupy such lands, with any such reservation of rights effective as of the date of the 1868 Treaty for the Wind River Indian Reservation lands which continued to be held in trust status.

With the 1868 Treaty completely silent on the subject of reserved water rights for the Indians who would occupy the Wind River Indian Reservation, any such rights remained inchoate until an adjudication or Act of Congress could provide a means to quantify, prioritize or otherwise determine their attributes. The inchoate nature of any federal reserved rights is apparent from the special master's decision in the Wyoming proceedings to quantify reserved rights by calculating practicably irrigable acreage based on technology available *at the time of the adjudication* and not as of the date of the reservation of the lands there at issue. Pet. App. H at 535a.

Thus, if there is a determination by this Court that the Indians of the Wind River Indian Reservation had water reserved for their use by the 1868 Treaty, there must also be a determination as to the manner in which these inchoate rights are to take form.

In *Arizona v. California, supra,* with no express direction from Congress as to the attributes of the water impliedly reserved, this Court accepted the practicably irrigable acreage standard devised by Simon H. Rifkind, special master in *Arizona v. California, supra,* as a means to quantify the amount of water reserved for the present and future needs of the five tribes whose rights were there at issue.

Congress left no similar void with respect to the means by which the water rights reserved for the Shoshone and Northern Arapaho Tribes of the Wind River Indian Reservation might be quantified. The 1905 Act ratifying

the Second McLaughlin Agreement directs the tribes to secure their rights under state law. The quantity of water the tribes might claim for the Wind River Indian Reservation is to be measured not by practicably irrigable acreage but rather by the rights secured under the laws of the State of Wyoming:

> [Certain federal funds] shall be devoted to surveying, platting, making of maps, payment of the fees, *and the performance of such acts as are required by the statutes of the State of Wyoming in securing water rights from said State for the irrigation of such lands as shall remain the property of said Indians,* whether located within the territory intended to be ceded by this agreement or within the diminished reserve.

1905 Act, Article III, 33 Stat. 1017. (Emphasis supplied.)

Wyoming law then and now follows the doctrine of prior appropriation: to secure a right to water, previously unappropriated water must be put to actual beneficial use, with the extent of the right equal to the amount put to such use. Wyo. Const. art. VIII, § 3. Thus, in 1905, Congress determined that the amount of water necessary for the Wind River Indian Reservation to accomplish its intended purpose was that amount of water which the Shoshone and Northern Arapaho Tribes and their federal trustee might put to actual beneficial use on Reservation lands under the laws of the State of Wyoming.

The 1905 Act provided an incentive for the tribes and for the predecessor of the Bureau of Indian Affairs to put water to immediate and continuous use on reservation lands. The water rights of future generations were to be measured by the diligence of present generations, acting under the tutelage and with the financial support of the federal trustee. Use it or lose it, not practicably irrigable acreage, was the Congressionally-mandated standard for

the quantification of water rights for the Indians occupying the Wind River Indian Reservation.

This Court need not weigh practicably irrigable acreage against Wyoming's prior appropriation standard of actual beneficial use or against some other necessity-based quantification standard to see which is the "best" standard for the quantification of the Shoshone and Northern Arapaho water rights. Congress spoke, over 80 years ago, to direct the quantification of such rights under the laws of the State of Wyoming. The plenary power of Congress over Indian affairs and tribal trust lands has long been recognized by this Court. *Shoshone Tribe v. United States,* 299 U.S. 476 (1937). ("Power to control and manage the property and affairs of Indians in good faith for their betterment and welfare may be exerted in many ways and at times even in derogation of the provisions of a treaty." 299 U.S. at 497.)

With the 1905 Act, Congress determined the means to quantify any water rights reserved by the 1868 Treaty for the Indians occupying the Wind River Indian Reservation. Practicably irrigable acreage, devised for five tribes by Simon Rifkind in the absence of any Congressional directive, cannot displace the quantification standard enunciated by Congress in 1905. The water rights of the Shoshone and Northern Arapaho Tribes of the Wind River Indian Reservation are to be quantified under the laws of the State of Wyoming. Prior appropriation and actual beneficial use, not practicably irrigable acreage, measure the right.

The practicably irrigable acreage standard of *Arizona v. California, supra,* was expressed in terms of land, but the purpose for the reservation of rights implied by this Court was to provide for the present and future needs of people. The preservation of rights for future generations need not only be by a means so passive as to award "X" amount of water to "X" amount of acres. As Special Master Tuttle observed in his report filed in *Arizona v. California,* 460 U.S. 605 (1983), this Court "did not necessarily adopt [the practicably irrigable acreage] standard as the universal

measure of Indian reserved water rights . . . ." *Report, Elbert P. Tuttle, Special Master,* February 22, 1982 at 90. (Footnote omitted.)

Congress in 1905 placed its faith in a partnership of federal and tribal efforts to develop the lands of the Wind River Indian Reservation. The approach chosen by Congress in 1905 strongly encouraged Indian self-determination with only those waters actually put to beneficial use by the Shoshone and Northern Arapaho Tribes reserved for the benefit of their future generations. The Congressional approach met with considerable success. The Supreme Court of Wyoming observed in the Big Horn proceedings that "during the period 1905–1908, the United States obtained state water permits for some 145,000 acres of Indian lands on the Wind River Indian Reservation . . . ." Pet. App. A at 23a.

A specific Congressional directive for the quantification of Shoshone and Northern Arapaho water rights, *not* a 1963 judicial standard of quantification developed without benefit of Congressional guidance, should determine the amount of water to be awarded the Indians of the Wind River Indian Reservation.

CONCLUSION

This Court selected practicably irrigable acreage as a means to quantify Indian water rights in *Arizona v. California,* 373 U.S. 546 (1963), in an effort to ensure that the present and future needs of five tribes along the Colorado River would be met.

Congress, in 1868, may have had a similar goal to provide for the present and future needs of the Indians of the Wind River Indian Reservation but, in 1905, chose an alternate and equally valid approach to the quantification of Indian water rights. The amount of water reserved to the Shoshone and Northern Arapaho would be determined by the interest, initiative and ability of the tribes and their

federal trustee to put water to good use under the laws of the State of Wyoming. Actual use, not practicably irrigable acreage, was the Congressionally-mandated quantification standard for the water rights of the Shoshone and Northern Arapaho Tribes occupying the Wind River Indian Reservation.

For all of the foregoing reasons, the decision of the Supreme Court of Wyoming requiring the use of the practicably irrigable acreage standard should be reversed.

Respectfully Submitted,

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In The

Supreme Court of the United States

October Term, 1988

STATE OF WYOMING,

Petitioner,

v.

UNITED STATES OF AMERICA, SHOSHONE-TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, *et al.*,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Wyoming

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE SHOSHONE-BANNOCK TRIBES IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Wyoming Supreme Court correctly relied upon and applied "practicably irrigible acreage" as the governing federal law standard for quantifying irrigation or agricultural water rights reserved for the Wind River Indian Reservation in 1868 by the Second Bridger Treaty.

No. 88-309

In The

Supreme Court of the United States

October Term, 1988

STATE OF WYOMING,

Petitioner,

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UNITED STATES OF AMERICA, SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, *et al.*,

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On Writ Of Certiorari To The Supreme Court Of Wyoming

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Amicus curiae Shoshone-Bannock Tribes respectfully move this Court for leave to file *amicus curiae* brief. Pursuant to Rule 36.2, *amicus curiae* requested written consent from the parties. Because amicus curiae has received only one reply, which is filed with this brief, amicus curiae is filing this motion. Upon receipt of the other written consents, they will be forwarded to the Court.

The interests of *amicus* Shoshone-Bannock Tribes in this case are as follows:

1. The Shoshone-Bannock Tribes of the Fort Hall Reservation in Idaho have a direct interest in the outcome of this case. The Shoshone-Bannock Tribes comprise a single, federally-recognized Indian tribe with a governing body fully recognized by the United States. *See* 28 U.S.C. § 1362.

2. The Shoshone-Bannock Tribes are successors-in-interest to tribal signatories of the Fort Bridger Treaty of July 3, 1868 with the Eastern Band of Shoshone and Bannock Tribes, 15 Stat. 673. Pursuant to Articles 2 and 4 of the Fort Bridger Treaty, the Wind River Reservation in Wyoming and the Fort Hall Reservation in Idaho were established as permanent tribal homelands. *Amicus* has a vital and continuing interest in any interpretation or construction of the common Treaty.

3. This case involves water, the single most valuable and important resource vested in the Shoshone-Bannock Tribes. Fair quantification of water rights reserved by the Tribes for agricultural purposes within the boundaries of the Fort Hall Reservation is essential to tribal self-sufficiency and entirely consistent with the permanent homeland guarantee in the 1868 Treaty.

4. In 1987, a general stream adjudication of all rights to use waters of the Snake Riven Basin located in Idaho was commenced in an Idaho State Court. *Amicus* and Idaho have been engaged since 1985 in negotiations to quantify the reserved water rights claims of the Shoshone-Bannocks. Resolution of the instant case before the Court

will significantly impact the ability of *amicus* to advocate its interests and claims to water under the Fort Bridger Treaty in the on-going negotiations.

For the foregoing reasons, the Shoshone-Bannock Tribes hereby seek leave of the Court to file the attached *amicus curiae* brief.

DATED this 12th day of April, 1989.

Howard A. Funke
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BRIEF OF AMICUS CURIAE SHOSHONE-BANNOCK TRIBES

INTEREST OF AMICUS CURIAE

Amicus curiae Shoshone-Bannock Tribes (hereinafter sometimes "Tribes") have an especial, two-fold interest in this case.

First, disposition depends upon construction of the Fort Bridger Treaty of July 3, 1868, ratified on February 24, 1869, and proclaimed by President Ulysses S. Grant on February 26, 1869, 15 stat. 673 (hereinafter sometimes "1868 Treaty" or "Second Bridger Treaty"). By that solemn treaty, the United States pledged its honor to secure the Wind River Indian Reservation in Wyoming Territory and the Fort Hall Indian Reservation in Idaho Territory as permanent homelands for the respondent Shoshone Tribe (and after 1878 for the respondent Northern Arapaho Tribe) and for the Shoshone-Bannock Tribes, respectively. Decision on the privotal question of whether the practically irrigible acreage (PIA) standard is the correct test for measuring the agricultural water rights guaranteed by the 1868 Treaty could have a debilitating impact upon the scope of water rights reserved by the Shoshone-Bannock Tribes.

Second, Wyoming, joined by numerous western states, urges this Court to modify or abandon the PIA test as adopted in *Arizona v. California*, 373 U.S. 546 (1963) (*Arizona I*). The states seek remand to the Wyoming courts so that the latter might apply vague "balancing" or "tailoring" rules in determining the water needs and entitlements of the respondent tribes for agricultural purposes. Acceptance of that invitation by the Court will cast long shadows over on-going negotiations between the Shoshone-Bannock Tribes and the State of Idaho, which are

on the verge of quantifying the Tribes' federally-reserved 1868 Treaty water rights within the Snake River Basin.

SUMMARY OF ARGUMENT

The limited question before the Court is whether the Wyoming Supreme Court properly adopted and applied the PIA standard strongly endorsed in *Arizona I*. Wyoming and several *amici* states seek modification or abandonment of that settled and core principle for quantifying the irrigation water needs and entitlements of Indian reservations. As urged by the respondent tribes and the United States, this Court should decline to deviate from the well-established PIA standard and should affirm the decision of the Wyoming Supreme Court.

United States v. Shoshone Tribe, 304 U.S. 111 (1938), as well as numerous other decisions, clearly recognized that a gradual adoption of agrarian pursuits by signatories to the Second Bridger Treaty was one fundamental purpose mutually understood in 1868 to underlie creation of both reservations created thereby. These precedents also confirm that utilization of PIA as the measure of the tribal agricultural water rights accords with the language and spirit of the 1868 Treaty. The PIA principle is also fully consistent with material historical evidence bearing upon the probable, original congressional and tribal understandings of the 1868 Treaty.

The manner in which this Court disposes of the instant litigation will temper the good-faith, government-to-government negotiations on-going since 1985 between the Shoshone-Bannocks, the State of Idaho, the United States and a coalition of interested Idaho water users. Designated the Snake River Negotiations, these intergovernmental discussions were intended to quantify the Tribes' federally-reserved water rights throughout the Snake River Basin in Idaho.

These Snake River Negotiations have been substantially premised upon the continuing viability of the PIA principle. Utilization of this principle has enabled structured, reliable approaches for quantifying the Shoshone-Bannocks' on-Reservation agricultural water rights under the *Winters* Doctrine. Erosion or elimination now of the PIA rule will seriously disrupt and imbalance these negotiations, thereby likely leading to protracted and divisive litigation.

If this Court accepts the states' proposed battery of "balanced" or "narrowly tailored" or similarly ambiguous tests designed to just meet "minimal" tribal needs, the certainty and finality lying at the heart of the PIA standard will be wholly undermined. The Court's continuing adherence to, and deliberate deployment of, the analytical apparatus required by the PIA standard does not produce "windfalls" for Indian people. Moreover, it cannot reasonably be inferred that a settlement or vindication of the Indians' legitimate agricultural water rights derived from application of PIA will result in any squandering of these essential resources by tribes.

If PIA's settled methodology for determining the nature and extent of water rights reserved for Indians is replaced by highly inappropriate state-court discretion to define tribal "minimal needs," the intrinsic value of the federally guaranteed water rights of Indian reservations will be destroyed, thereby forever consigning reservation Indians to a permanent underclass status.

I. THE WYOMING SUPREME COURT CORRECTLY RELIED UPON AND APPLIED THE "PRACTICALLY IRRIGABLE ACREAGE" (PIA) STANDARD OF ARIZONA V. CALIFORNIA, 373 U.S. 546 (1963) (ARIZONA I) TO MEASURE THE EXTENT OF WATER RIGHTS NECESSARY TO FULFILL

THE AGRARIAN PURPOSES UNDERLYING CREATION OF THE WIND RIVER INDIAN RESERVATION BY THE SECOND BRIDGER TREATY.

The precise and only question before this Court is whether the Wyoming Supreme Court properly adopted and applied the PIA standard clearly articulated in *Arizona I*. Wyoming and the *amici* states invite this Court to adjust or abandon PIA in favor of an assortment of ambiguous "needs" tests deliberately designed to maximize the discretion of state courts in quantifying Indians' reserved water rights for agricultural purposes. Respondent and *amici* tribes, and the United States, urge that this Court decline to deviate from PIA and affirm the decision by the Wyoming Supreme Court on this point.

As amply demonstrated by briefs filed herein by the United States, the respondent tribes and other *amici* tribes, Wyoming's belated assault upon the PIA standard finds no reasonable support in the Court's pertinent precedents. These briefs also demonstrate the absence of any credible basis for accepting the states' thinly-veiled, optative attempt to effect an erosion—even elimination—of the Court's seminal decision in *Winters v. United States*, 207 U.S. 564 (1908) (*Winters*).[1]

The Shoshone-Bannock Tribes focus on the primary judicial rulings which confirm that a gradual transforma-

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[1] In *Winters*, 207 U.S. at 576-77, the Court announced the rule that creation of an Indian reservation implicitly guarantees for tribal use that amount of previously unappropriated water needed to fulfill the purposes of the reservation. In *Arizona I*, the Court reaffirmed the *Winters* Doctrine, holding that these reserved water rights, "effective" when an Indian reservation is established, are quantified to an extent necessary "to satisfy the future as well as the present needs" of the reservation. 373 U.S. at 600: *Arizona I* also adopted the PIA standard as "the only feasible and fair way by which reserved water for the [agricultural purposes of] reservations can be measured." *Id.*, at 601.

tion of the signatory Indians from nomadic to agrarian pursuits was just one key component of the permanent homelands purpose for creation of the Wind River and Fort Hall Reservations. These cases fairly establish that PIA is a proper measure of the irrigation water entitlements for these tribal homelands. The history of the Second Bridger Treaty and of the Fort Hall Reservation also underscores that irrigation of all practically irrigable acreage on those Treaty reservations is consistent with the original congressional and tribal understandings of the Treaty commitments and consonant with long-settled tribal expectations.

A. The PIA Standard Is Fully Consistent With Numerous Judicial Decisions Confirming That Gradual Adoption of Agrarian Pursuits By the Signatory Indians Was a Key Purpose For Creation of the Wind River and Fort Hall Reservations.

In *United States v. Shoshone Tribe*, 304 U.S. 111, 118 (1938), this Court, based upon an examination of the terms of the Second Bridger Treaty, concluded that such language "plainly evidence[d] [a] purpose on the part of the United States to help to create an independent permanent farming community upon the [Wind River] reservation."[2]

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[2]The Court noted that a "purpose of the [1868] [T]reaty was that the Shoshones should have, and permanently dwell in, the [Reservation] defined" by Article 2 of the Second Bridger Treaty. *Id.* at 116. In so holding, the Court construed the pertinent Article 2 phrase—securing the Wind River Reservation for the "absolute and undisturbed use and occupation" of the Shoshones—in light of the "settled policy of the United States fairly to deal with Indian tribes." *Id.* The Court specifically held that the Treaty reserved to the Shoshones and Arapahos all minerals and timber within the original Wind River Reservation boundaries despite the absence of any explicit Treaty language to that effect.

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In *State v. Tinno*, 94 Idaho 759, 497 P.2d 1386 (1972) (*Tinno*), the Idaho Supreme Court unanimously reaffirmed the continuing validity of off-Reservation anadromous fishing rights reserved by the Shoshone-Bannock Tribes in Article 4 of the Second Bridger Treaty.[3] The court

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In *Swim v. Bergland*, 696 F.2d 712, 715-716 (9th Cir. 1983) (*Swim*), the court, relying upon both *Winters* and *United States v. Shoshone Tribe, supra*, concluded that the same Article 2 of the 1868 Treaty reserved to the Shoshone-Bannock Tribes exclusive grazing rights within the original Fort Hall Indian Reservation despite the silence of the 1868 Treaty concerning such rights. The Ninth Circuit in *Swim* affirmed the trial court's finding that "the parties to the [1868] Treaty agreed and understood that the purpose of the Reservation was to enable the Tribes to transform themselves from a nomadic to an agrarian society and that grazing rights were essential to help effectuate this transformation." *Id.* at 716. *Swim* relied in this respect upon a comparable conclusion in *Skeem v. United States*, 273 F. 93, 95 (9th Cir. 1921) (*Skeem*). *Swim* further concluded that the "objective of self-sufficiency [for the tribal signatories was] implicit in the 1868 Treaty . . . ." *Id.* at 719.

The decision in *Skeem* foreshadowed the yet-to-be announced PIA standard of *Arizona I*. Relying upon *Winters* and *United States v. Winans*, 198 U.S. 371, 380-381 (1905), for the proposition that the Second Bridger Treaty reserved the Shoshone-Bannock Tribes' pre-existing rights to the Reservation, the Ninth Circuit in *Skeem* declared:

> The purpose of the government was to induce the Indians to relinquish their nomadic habits and to till the soil, and the treaties should be construed in the light of that purpose *and such meaning should be given them as will enable the Indians to cultivate eventually the whole of their lands so reserved to their use.*

273 F. at 95 (emphasis supplied).

[3]Article 4 of the 1868 Treaty stipulated that although the signatory tribes would make the Article 2 reservations "their permanent home[s]," such tribes would retain the continuing "right to hunt on the unoccupied lands of the United States [outside of those reservations] so long as game may be found thereon, and so long as peace subsists among the whites and the Indians on the borders of the hunting districts." 15 Stat. 674. In holding that the "right to hunt" under this provision

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described the dual purposes underlying that Treaty as follows:

> The gathering of food from open lands and streams constituted both the means of economic subsistence and the foundation of a native culture. Reservation of the right to gather food in this fashion protected the *Indians' right to maintain essential elements of their way of life, as a complement to the life defined by the permanent homes, allotted farmlands, compulsory education, technical assistance and pecuniary rewards offered in the Treaty.* • • • *[T]he mere passage of time has not eroded the rights guaranteed by a solemn treaty that both sides pledged on their honor to uphold.*[4]

B. The PIA Standard Is Fully Consonant With the History of the Second Bridger Treaty and of the Fort Hall Reservation.

This Court's analysis in *Arizona I* and in *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979) (*Fishing Vessel*), firmly establishes that contemporary resolution of Indian treaty claims to scarce natural resources must be grounded in a careful examination of relevant history. In light of that approach and the grave significance of this case to the Tribes, we

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embraced the continuing right to fish off-Reservation for subsistence and ancestral purposes, *Tinno* rejected as "entirely discredited" the ruling in *Ward v. Race Horse*, 163 U.S. 504 (1896), that admission of Wyoming to statehood in 1890 had repealed implicitly the Article 4 right of the Shoshone-Bannocks to hunt upon unoccupied federal land within that state, 94 Idaho at 765 n.6, 497 P.2d at 1392 n.6, including open lands within the Big Horn Basin.

[4] 94 Idaho at 766, 497 P.2d at 1393 (emphasis added). Several judicial decisions have construed the *Winters* Doctrine to embrace necessary water to preserve fish and wildlife resources on reservations and in formerly relinquished lands. *See e.g., United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), *cert. denied*, 467 U.S. 1262 (1984); *Confederated Colville Tribes v. Walton*, 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981).

overview here some pertinent history of the Second Bridger Treaty and of the Fort Hall Reservation.

The Second Bridger Treaty was one of a series negotiated in 1867-68 by a federal commission (hereinafter "Peace Commission") established by the Act of July 20, 1867, 15 Stat. 17. Section 1 of this legislation empowered the Peace Commission, composed of eminent civilian and military leaders, to negotiate with then hostile Indian tribes in order to:

> . . . ascertain the alleged reasons for their acts of hostility, and . . . to make and conclude . . . such treaty stipulations, subject to the action of the Senate, as may remove all just cause of complaint on their part, and at the same time establish security for person and property along the lines of railroad now being constructed to the Pacific and other thoroughfares of travel to the western Territories, and such as will most likely insure civilization for the Indians and peace and safety for the whites.

Id. Section 2 of this enabling legislation directed the Peace Commission to locate areas of

> *sufficient tillable or grazing land to enable the* [*various tribes*] . . . *to support themselves by agricultural and pastoral pursuits.* Said district or districts, when so selected . . . and approved by Congress, *shall be and remain permanent homes for said Indians to be located thereon,* and no person[s] not members of said tribes shall ever be permitted to enter thereon without the permission of the tribes interested, except officers and employees of the United States . . . .

Id. (emphasis added).

Senator Henderson of Missouri, the Chairman of the Senate Committee on Indian Affairs and a designated member of the Peace Commission, introduced the bill (S. 136) leading to the 1867 Act on July 15, 1867. Cong. Globe, 40th Cong., 1st Sess. 655, col. 3. The following day he de-

scribed to the Senate the exigencies necessitating the legislation:

> It is known to us that an Indian war is now being waged. Hostilities are of daily occurrence upon the Plains. * * *
>
> Now we are attempting to construct across the Plains two railroads. With these facts before us it is useless to pretend that these railroads can be constructed. General Sherman . . . says that fifty of these Indians can checkmate three thousand of our soldiers. It is unnecessary for me to go into the history of this Indian war—I have the notes of it before me—because there are but two tribes of any great extent that are engaged in hostilities against the United States: I mean the Sioux or Dakota Indians . . . and the Cheyennes and Arapahoes united together.
>
> * * * . We know the fact that unless these hostilities are suppressed, and suddenly suppressed, a very large expenditure will be forced upon us. Our Treasury is in no condition to meet it. We need to husband our resources, and if we can make peace with the Indians we had better do it.

Id. at 667, col. 3 (July 16, 1867). Urging that the government "stand . . . up to our own treaty obligations," he argued that any other course "will only inflict dishonor upon ourselves and accumulate our public debt." *Id.* at 669, col. 2.[5]

The ensuing Senate debates from July 16-18, 1867 expanded into a wide-ranging discussion of overall federal policy regarding Indians. There was no disagreement that war against a few hostile tribes would prove far too

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[5]Laying out considerable historical detail, Senator Henderson then proceeded to explain exactly why the Sioux and Cheyenne-Arapahoe had engaged in hostilities: the United States government had violated existing treaty commitments to

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costly to the national government.[6] Nor was there any real dispute that the United States had violated treaty commitments in numerous instances throughout American history.[7] Concensus also existed on the need to locate the warring tribes and all roaming Indians upon reservations removed from rail and wagon lines to the West.[8]

The Senate clearly understood, however, that those tribes which had lived forever solely by hunting, fishing, and gathering would have to continue those pursuits and would be transformed to an agrarian lifestyle only with great difficulty and care. Senator Harlan of Iowa, a former Secretary of the Interior, expressed this understanding which underlies the treaties, including the Second Bridger Treaty, subsequently concluded by the Peace Commission:

> * * * . There are the Crows and the Blackfeet, who have inhabited this region of country for centures, and who are as much attached to the soil, doubtless, as the white people are attached to their homes, and they would be as difficult to remove [to the Oklahoma Territory] as the people of Switzerland would be from the hills on which they have resided for centuries.

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these Indians by allowing construction of wagon roads and forts over territory acknowledged as theirs without their consent and without compensation to them. *Id.* at 668-69 (July 16, 1867).

[6]Cong. Globe, 40th Cong., 1st Sess. 680, col. 3 (July 17, 1867) (Remarks of Senator Sherman); *Id.* at 681, col. 1 (same); *Id.* at 708, col. 1 (July 18, 1867) (Remarks of Senator Morrill); *Id.* at 708, col. 3 (Remarks of Senator Pomeroy).

[7]Cong. Globe, 40th Cong., 1st Sess. 680, col. 1 (July 17, 1867) (Remarks of Senator Sherman); *Id.* at 681, col. 3 (Remarks of Senator Howe); *Id.* at 683, col. 2 (Remarks of Senator Howard).

[8]Cong. Globe, 40th Cong., 1st Sess. 670, col. 3 (July 16, 1967) (Remarks of Senator Henderson); *Id.* at 679, col. 2 (July 17, 1867) (Remarks of Senator Sherman); *Id.* at 681, col. 2 (Remarks of Senator Pomeroy); *Id.* at 682, col. 1 (Remarks of Senator Howe).

> * * * . We must look at these things practically. Theoretically, it might be very well to send them all down south . . .; but we know practically, I suppose, everybody who has looked into the subject closely knows, that the northern Indians cannot be induced to go down there. They have lived on the buffalo, the elk, the antelope, the deer, the vegetable products of that country, and the fish of the streams for century after century, and they are as much attached to their homes as we to ours.[9]

The Peace Commission, acting pursuant to the 1867 Act, negotiated the Second Bridger Treaty with tribal leaders Washakie and Tahgee. Washakie was well respected in Congress and throughout the West as:

> . . . such a man that if we had more like him, whether among the pale faces or Indians, we should have but very little trouble and be better off upon the frontier.[10]

Tribal signatories to the Second Treaty of Fort Bridger were composed of several groups identified anthropolo-

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[9]Cong. Globe, 40th Cong., 1st Sess. 678, col. 2 (July 17, 1867); *Id.* at 713, col. 1 (July 18, 1867). These views were echoed by Senator Henderson who also emphasized that continuation of traditional tribal pursuits could eliminate the necessity of governmental aid to the Indians. *Id.* at 703, col. 1. Senator Henderson likewise expressed the commonly held view in the Senate that all treaties previously made by the United States with Indian tribes operated to recognize the Indians' pre-existing rights as the original inhabitants of the continent. *Id.* at 668-669 (July 16, 1867).

[10]Cong. Globe, 40th Cong., 3d Sess. 803, col. 1 (February 2, 1869) (Remarks of Representative Hooper of Utah Territory). Of Washakie's tenure as a Shoshone leader for decades before and after 1868, Justice Cardozo, speaking for the Court, stated in *Shoshone Tribe v. United States*, 299 U.S. 476, 486 (1937):

> The loyalty of the Shoshone Tribe to the people of the United States has been conspicuous and unfaltering. A fidelity at least as constant and inflexible was owing in return.

gically as "Northern Shoshone" and "Bannocks."[11] In that Treaty, 15 Stat. at 677, the federal negotiator, General C.C. Augur of the Peace Commission, designated these tribal entities as the "eastern Band of Shoshonees" (led by Chief "Wash-a-kie") and the "Bannock Tribe" (led by Chief "Tag-gee"). In fact, however, the entities thus aggregated were not merely two, unrelated tribal groups. In *Tinno* the Idaho Supreme Court, based on expert anthropological and linguistic evidence, found:

> . . . the Indians represented at the Fort Bridger negotiations were a rather diverse group in terms of geography and social or political allegiance. • • • [T]he various tribes or bands were in fact rather loosely knit units, and individual families freely changed their associations from one group to another; so called Shoshone Indians could and did join and live with Bannock bands and did intermarry. The two languages [Shoshone and Bannock] though different, were not substantial hurdles to social mixing.[12]

During the pre-1868 period, the Tribes considered the current location of the Fort Hall Reservation along the Snake River as their home, spending several months of

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[11]Brigham D. Madsen, *The Northern Shoshoni* 17-26 (Caxton Printers, Caldwell, Idaho, 1980) (hereinafter *"The Northern Shoshoni"*).

[12]94 Idaho at 762-63, 497 P. 2d at 1389-90. From ancestral times, the Shoshone-Bannock Tribes, including current descendants of Tahgee's Bannock Tribe, have always used an extensive aboriginal domain for migratory hunting, fishing and gathering pursuits. In *Tinno*, 94 Idaho at 764, 497 P. 2d at 1391, the Idaho Supreme Court, relying again upon expert anthropological evidence, found that the Shoshone-Bannock before 1868 ranged over "vast areas of Idaho and surrounding States," including "the Salmon River country, the Snake River country, and the length of what is now Southern Idaho". See also *State v. Cutler*, 109 Idaho 448, 461, 708 P. 2d 853, 866 (1985) (dissenting opinion) (Tribal aboriginal territory included major portions of Idaho and all surrounding states); 11 Ind. Cl. Comm. 387, 404-405 (1962); *The Northern Shoshoni*, 17-26.

each annual migration in that locale.[13] Scholarly research confirms Shoshone-Bannock utilization of the Fort Hall Reservation region since time immemorial.[14]

As found in *Swim*, 696 F.2d at 714, "[a]lthough the [1868] Treaty called for a Reservation of 1.8 million acres, 'surveying errors' in 1873 reduced its actual size to approximately 1.2 million acres." Between 1880 and 1900, the Tribes entered into cession agreements with the United States, whereby the original Fort Hall Reservation was yet further reduced to about 534,000 acres. *Id.*[15]

II. THE SNAKE RIVER NEGOTIATIONS DEMONSTRATE THE PIA STANDARD IS THE MOST RELIABLE AND EQUITABLE MEANS FOR RESOLVING INDIANS' RESERVED WATER RIGHTS CLAIMS FOR AGRICULTURAL PURPOSES.

Since 1985 the Shoshone-Bannock Tribes, the State of Idaho, private Idaho water users, and the United States

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[13]See *Shoshone Tribe v. United States, supra,* 11 Ind. Cl. Comm. at 404 (finding that before 1868 "Shoshone and Bannock Bands . . . preferred the country along the Snake River and its tributaries in southeastern Idaho" as their "home-base or area of greater attachment").

[14]Recent archaeological research by scholars working at Idaho State University near Fort Hall confirms Shoshone and Bannock utilization of the Reservation area for at least 2,000 years, and probably ranging deeper than 12,000 years into the immemorial past. See also *The Northern Shoshoni* at 17 (Introduction by Dr. M. Wells, Idaho State Historical Society) ("People have lived in the Salmon River mountains and the Snake River Plains—the traditional homeland of the Northern Shoshoni—for the past fourteen thousand years or more").

[15]The current Fort Hall Reservation contains 543,932 acres which is owned primarily by the Tribes collectively (47 percent) and by individual Indians holding allotments subject to restraints on alienation without the consent of the United States (43 percent). The United States holds title to about six percent of Reservation lands, most of which (more than 28,000 acres) were ceded to the United States in 1924 to assure construction of the American Falls Reservoir. See Act of May 9, 1924, 43 Stat. 117. Non-Indians own about four percent of current Reservation lands.

have been engaged in negotiations to quantify the Tribes' federally reserved water rights in the Snake River Basin in Idaho (hereinafter sometimes "Snake River Negotiations"). These historic, good-faith efforts are designed to finally and fairly determine the amount of water to which the Shoshone-Bannocks are entitled to satistfy agricultural purposes underlying creation of the Fort Hall Reservation. In seeking to fulfill the nineteenth century Treaty promises of water for this agrarian purpose, the negotiating parties in Idaho are relying substantially on PIA as foreshadowed in *Winters* and explicitly adopted in *Arizona I*.[16]

A. Use of PIA Has Enabled the Shishone-Bannock Tribes, Supported by the United States, to Engage in an Open, Good-faith, Negotiation Process With the State of Idaho and Non-Indian Water Users To Address Common Interests and Resolve Conflicts Over the Waters of the Snake River.

Following nearly four years of intensive, amiable good-faith negotiations with the State of Idaho, the Shoshone-Bannocks are dismayed by Idaho's arguments before this Court as *amicus curiae*, characterizing these negotiations founded on the use of PIA as "producing unreliable results." *Brief of Amici States*, 16. Idaho portrays PIA as a "divisive" standard which "continues to frustrate negotiations." *Id.* at 17. Idaho and other *amici*

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[16]The Snake River Negotiations have been premised since inception upon the continued viability of PIA. Any modification or abandonment of that well-settled doctrinal principle will definitely sabotage these negotiations, lead to protracted and divisive litigation, undermine the integrity of 1886 Treaty commitments made by the Tribes and the United States, and authorize state courts to engage in wide-ranging "balancing" of Indian and non-Indian water needs. Clearly, decision in this case is of the utmost importance to the Shoshone-Bannock Tribes and all Indian tribes in the western United States.

states' half-hearted attempt to disparage PIA, in light of the Snake River Negotiations, appears to be advanced purely for litigious and political reasons.[17] The Shoshone-Bannock Tribes adamantly disagree with Idaho's characterization of these negotiations.[18]

Federally reserved water rights—specifically, the Shoshone-Bannock Tribes' water rights—were targeted for inclusion in an Idaho state court general stream adjudication of the Snake River as early as 1984.[19] The Tribes, cognizant of the divisive and costly nature of litigation, proposed to the Legislature that the State of Idaho join the Tribes in good-faith, government-to-government negotiations to define and quantify the nature and extent of the Tribes' federally reserved water rights under the *Winters* Doctrine in the Snake River Basin in Idaho.

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[17]If equipped with this new arsenal of subjective "tailoring" measures, Idaho would be free to renegotiate—virtually dictate—the terms of a recently proposed water rights settlement with the Tribes. Such an outcome was not bargained for —more than four years ago—by the respective parties when the process of negotiations was debated and subsequently elected as the preferred process for determining the measure of the Tribes' water rights.

[18]In *Arizona v. San Carlos Tribe*, 463 U.S. 545 (1983) (*San Carlos*), a majority of the Court held that state courts could exercise concurrent jurisdiction to adjudicate Indians' water rights reserved under federal law. As early as January 1985, just eighteen months following *San Carlos*, the 48th Idaho Legislature was moving to initiate a massive general stream adjudication of the Snake River Basin in Idaho, and thereby raise an estimated $27 million to underwrite such litigation.

[19]On October 7, 1984, Idaho's Governor Evans called for legislation authorizing a general stream adjudication of the Snake River and served notice that "Shoshone-Bannock tribal water rights, as well as the Idaho National Engineering Laboratory's federal water reserve, will be included in the adjudication process." B. Bugger, "Evans: Benefits of Agreement Will Outweigh Costs," *Idaho State Journal* (Pocatello, Idaho: October 7, 1984), 2.

In ensuing legislative hearings following the Tribes' initiative, considerable discussion occurred, centered around the relative merits of litigation as opposed to negotiation of the Tribes' water rights.[20] The Tribes suggested that Idaho and its Indian citizens could learn from the mistakes of other states and tribes. The Tribes insisted satisfaction of the Shoshone-Bannocks' reserved water rights through a negotiated process could lead to an agreement which would benefit both Indians and non-Indians.

To its credit, the 48th Idaho Legislature, joined by the Governor, Attorney General, irrigators, and the principal investor-owned utility, responded with virtual unanimity in supporting a two-year delay of the adjudication in favor of attempting a negotiated settlement. H. Con. Res. 16, 48th Idaho Leg., 1st Sess. (1985). By resolution dated July 17, 1985, the Fort Hall Business Council, the duly-recognized tribal governing body, requested that the United States, consistent with federal trust responsibilities to the Tribes, assist and participate in the Snake River Negotiations.[21]

Assuring the participation of private Idaho water users in the Snake River Negotiations was of concern to

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[20]The experience of Wyoming and the respondent tribes in the Big Horn River adjudication was cited as the classic example of the divisive and costly result of an all-out attempt by a state to limit or eliminate Indians' water rights. Specifically referring to the Big Horn River litigation as the "Great Wyoming Shoot-out" with the only winners the "hired guns," Special Master and former Congressman Teno Roncalio admonished the parties in Idaho to negotiate a mutually beneficial agreement rather than litigate. Snake River Negotiations, Address of T. Roncalio, February 28, 1986 at Hall of Mirrors in Boise, Idaho.

[21]On August 30, 1985, by a Memorandum of Understanding, the Tribes, the State, and the United States agreed to commence good faith, government-to-government negotiations as

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the governmental parties from the outset. Executive Order No. 85-9, issued by then-Governor Evans, instructed the Chairman of the Idaho Water Resource Board to represent Idaho in the negotiations, and, further, to provide for the effective involvement of interested Idaho water users and ther members of the public therein.[22]

In the spring of 1986, the Tribes, State, and water users jointly drafted comprehensive revisions to the Idaho water adjudication statute, which provided, *inter alia*, for a general stream adjudication and allowed for a negotiated settlement of the Tribes' *Winters* Doctrine claims, as well as all other federal water claims in Idaho, to be submitted to the state court in lieu of litigation claims. The negotiations proceeded with the Tribes, State of Idaho, United States, and interested water users all seated equally at the four-place table, committed to good-faith negotiations, with decisionmaking based on sharing of the best information available.

Utilizing the *Arizona I* framework, PIA was endorsed by all parties from the outset as a settled and accepted

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early as October 15, 1985. On January 10, 1986, the Tribes, the State and the United States agreed to extend that August 30, 1985 Memorandum of Understanding. The parties subsequently made a Technical Studies Agreement establishing a methodology to review the Tribes' reserved water rights claims and to identify matters for further discussion and analyses.

[22]On October 31, 1985, the Chairman of the Idaho Water Resource Board, joined by the Tribes and the United States, appointed an Ad Hoc Committee to recommend how best to provide for the effective involvement of interested Idaho water users and other members of the public in the negotiations. That committee submitted its recommendation for review by the Idaho Water Resource Board on December 6, 1985 and for action by negotiators on December 10, 1985. Thereafter, interested water users were provided access to the Snake River Negotiations on equal footing with the Tribes, the State of Idaho, and the United States.

standard to be employed in measuring the Tribes' water right for agricultural purposes.[23] Through four years of negotiation, PIA was never questioned as the appropriate basis for determining the tribal agricultural water rights. From the very inception of the Snake River Negotiations, the approach was, first, to determine the Tribes' water entitlements under the *Winters* Doctrine, and, second, to satisfy those tribal rights in a manner that minimized adverse impacts on present, non-Indian water uses permitted under state law.

Thus, in the Snake River Negotiations, PIA provided a settled and equitable foundation for an open, workable approach to measurement and satisfaction of the Tribes' current and future needs based on the best available evidence. The structure, certainty and focus provided by the PIA standard settled since *Arizona I* brought all parties—Indians and non-Indians—to the bargaining table as equals, intent upon fashioning a mutually-beneficial agreement that was consistent with the congressional and tribal intentions underlying the Treaty and subsequent tribal and federal agreements.

The negotiations provided an opportunity for the Tribes to measure by an objective and fair standard their entitlement to a reserved water right. The State and water users were given the opportunity to fashion a water agreement that devoted much time and analysis to devising a solution which would minimize impacts on non-Indian water users. The proof of the productivity of this nego-

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[23]The Tribes hired an agricultural engineer, Woldezion Mesghinna of Stetson Engineers, also the expert for respondent tribes in this case, to prepare the Shoshone-Bannock Tribes' claims to water for agricultural purposes as implicated by PIA. The Idaho water users retained Craig Sommers of ERO Engineering, the State of Wyoming's principal expert in this case, to evaluate and scrutinize the Tribes' agricultural claims in the Snake River Negotiations.

tiated effort, structured around PIA, lies in the fact the parties are close to concluding an agreement.[24]

B. These Snake River Negotiations Have Entailed Reliable, Reasonable, and Cost-Effective Technical Analyses To Measure the Tribes' Water Rights, In Part, by the PIA Standard.

The settled principles established by *Arizona I* served as a foundation for the water claims advanced by the Tribes for agricultural purposes. Using PIA, those tribal claims were based on the number of acres within the Fort Hall Reservation land base susceptible to sustained irrigation at reasonable cost.[25] The Tribes' claims were then subjected to searching and detailed scrutiny by the Idaho Department of Water Resources, its expert consultant engineering firm, Idaho water user groups and their engineering experts, as well as soil scientists from the United States Department of Interior through the Bureau of Indian Affairs and the Bureau of Reclamation. Yet Idaho claims that PIA proved "unreliable because small changes in certain parameters" implicit in the standard "created dramatic changes in the Tribes' irrigible acreage." *Brief of Amici States* at 16. Idaho suggests that because disagreement surfaced over underlying parameters, PIA proved "divisive." *Id.*

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[24]Indeed, the most divisive and unsettling factor in the negotiations has been the grant of *certiorari* by this Court. Arguments advanced by Wyoming and the *amici* states fairly imply a potential for further limiting tribes' reserved water rights beyond limits already imposed by the PIA standard. Wyoming and the *amici* states anticipate that this Court may sanction unbridled discretion by state courts, thereby positioning the states to effect a substantial reduction of tribal water entitlements.

[25]In an agreement saving taxpayers hundreds of thousands of dollars, the parties initially agreed that no further studies of soils were necessary. As a result, the Tribes' claims were based on existing soil studies by the United States Soil Conservation Service and United States Bureau of Reclamation.

Idaho and the *amici* states characterize tribal proposals as "abstract" irrigation projects that will "never be developed." *Id.* at 10. Idaho cities the proposed Fort Hall projects requiring a transmountain diversion as their exemplum of such Indian irrigation projects. *Id.* at 16. However, these so-called abstract, never-to-be-developed projects were actually proposed by the United States government in the design of future tribal irrigation systems long before the Tribes initiated good-faith negotiations. That design was subsequently adopted by Tribal engineering experts due to its economic feasibility.

Idaho states these expensive projects could only be justified by factoring in the production of specialty crops, i.e., carrots, and by "attaining yields on other crops exceeding yields currently obtained by non-Indian farmers in the same area." *Id.* at 17. The alleged "excessive yields" projected by the Tribes' experts for crops such as alfalfa are, in fact, already attained and sometimes exceeded by adept non-Indian corporate farmers in the area.[26]

Idaho further suggests that agreement could not be reached on cropping patterns. But that was because neither tribal nor federal negotiators could accept a crop rotation scheme recommended by the State. The State's proposed crop rotations consumed little water and provided only marginal economic returns thereby reducing the benefit/cost ratios for the tribal projects and, as a result, drastically reducing the tribes' water entitlement as

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[26]Carrots—also grown by non-Indians in the area—were included as part of the overall crop rotation. Once Reservation lands are determined susceptible to sustained irrigation, whether carrots are, or are not, included in the crop rotation is irrelevant.

measured by the PIA standard.[27] Idaho states there was not final agreement on the amount of arable lands within the Fort Hall Reservation. However, the difference between the parties was *de minimis*.[28]

Negotiations naturally embrace disagreements over a variety of factors underlying any measurement of tribes' reserved water rights. Using PIA, the Snake River Negotiations required and allowed parties to refine such differences. The original intention of negotiators, i.e., determining the Tribes' entitlement to water and satisfying such an entitlement with sensitivity to non-Indian water uses, has remained intact. So too have the Tribes' claims to water rights reserved under *Winters*, measured in part by PIA.[29]

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[27]Idaho also sought to impose usurious "discount rates" in evaluating the costs and benefits of future development of the Tribes' irrigation systems, twice the rate of time preference accepted and applied by the Wyoming Supreme Court. Such inflated discount rates would require that Indians, in developing their water resources, have an extremely short time horizon, i.e., that they heavily discount future returns. See T. Koopmans, "Proof for a Case where Discounting Advances the Doomsday," *Review of Economic Studies* (Symposium on the Economics of Exhaustible Resources, 1974) 117-120.

[28]None of Idaho's arguments, when viewed in their proper context, justify the characterization of the PIA standard as "divisive" or the tribal projects as "fantasies." A comparison of the exacting scrutiny imposed on Indians' water projects through the PIA standard against that of the largess associated with other western water projects—*inter alia* the Central Valley Project, the Central Arizona Project, and the Central Utah Project—demonstrates that the real fantasy lies in the feasibility standards for non-Indian projects, not PIA. See e.g., M. Reisner, *Cadillac Desert* (New York: Viking Penquin Inc., 1986) 151-75.

[29]The parties to the Snake River Negotiations are in the process of exchanging a fourth draft agreement, and this very day, the Tribes' submitted a draft agreement to Idaho water users for their consideration. The "balance" at the negotiating table will severly tip to the state's favor if armed by this Court with "tailoring" or "minimum needs" tests. Such onerous and

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III. MODIFICATION OR ABANDONMENT OF THE PIA STANDARD IN FAVOR OF AMORPHOUS BALANCING TESTS WILL ESCALATE UNCERTAINTY, CREATE EXTREME FRICTION, AND REQUIRE PROTRACTED LITIGATION.

The thrust of the positions of Wyoming and the *amici* states is that Indian signatories to the treaties, in exchange for surrender of the right to occupy millions of acres of pristine land—and ways of life enjoyed unfettered from non-Indians' encroachment since time immemorial—, received in return nothing more than an opportunity to achieve the barest minimum standard of living to be derived from the natural resources of their homelands.

A. The "Tailored" Tests Which Wyoming and the Amici States Urge This Court To Adopt Necessarily Embrace Minimal-Existence Theorems Thoroughly Discredited By Economists.

Wyoming and the *amici* states urge this Court, upon remand, to instruct the Wyoming courts to administer a hodgepodge of tests so as to assure: (1) that those water rights retained in tribal ownership are just sufficient to avoid entirely defeating the tribal/congressional purposes underlying the creation of permanent tribal homelands; (2) that Indians receive no "windfalls" in any state court adjudication; and (3) that no additional water is made available for tribal use absent a "demonstrated need", or if "ample opportunity" to participate in federal water resource development projects has already been afforded per chance to tribes.[30]

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invidious standards leave tribes with no option but litigation in a protracted attempt to prevent the usurpation of their water rights.

[30]Further, borrowing a phrase from *Fishing Vessel*, a case which implicated only fishing rights jointly held in common and

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1. This Court Has Repeatedly Rejected the Tests Proposed By The States.

This is not the first invitation urged upon this Court to sanction a balancing test for determining the scope of reserved rights. In other previous cases before this Court, such arguments were flatly rejected.[31] This Court and others have long recognized that an open-ended balancing test is wholly inappropriate in the context of Indian water rights litigation. This Court should continue to reject out of hand any specious balancing test.

2. Economists, Following Centuries of Debate, Discarded Minimal Existence Theorems Because of Their Untenable Assumptions and Subjectivity

Assuming *arguendo* that the states' selective appeal to the diverse case precedents accurately reflects upon the

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affirmed by and for both Indians and non-Indians, the states request this Court's permission to empower their elected jurists to confine Indians to a "moderate" standard of living and "narrowly tailor" the scope of any Indian water rights settlement, so as to provide "sensitivity" to the recently settled expectations of non-Indian water users acting pursuant to state laws.

[31]In *Winters*, the Court determined that Indian water rights were paramount to subsequent non-Indian state water appropriations. In *Winters*, the non-Indians contended that "if the claim of the United States and the Indians be maintained, the lands of the defendants and the other settlers be rendered valueless, the said communities will be broken up and the purpose and object of the government in opening said lands for settlement will be wholly defeated." 207 U.S. at 570. The Court understood the conflict between Indians and non-Indians' claims, but recognized "that which makes for the retention of the waters [by the Indians] is of greater force than that which makes for their cession." *Id.* at 576. Thus the Fort Belknap Agreement of 1888 creating the reservation was of "greater force" than the investments subsequently made by the settlers.

The Court of Appeals of the Ninth Circuit has consistently followed the lead of this Court. Commenting on *Winters*, the

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Court's past judgment, there remains the issue of whether it would even be possible for state courts to carry out such tests in any objective, supportable manner. Apparently, the states are unaware of a debate which occurred in economics over roughly two centuries beginning in the mid 1600's.

The extended debate sought to establish an objective standard for determining the "minimal needs" of the class of people who furnished their labor power in the production of commodities. Economists finally agreed that any theoretical underpinning lending support to a minimum-of-existence theory of wages necessarily rested upon an untenable and uncritical acceptance of T. Malthus' "Law of Population," i.e., that exponential population growth outstripped finite resources and bid wages down to a subsistence level—or below.[32] If this Court breaks faith with

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Ninth Circuit noted that "the Indians were awarded paramount rights regardless of the quantity remaining for the use of white settlers." *United States v. Ahtanum Irrigation District*, 236 F.2d 321, 327 (9th Cir. 1956) *cert. denied*, 352 U.S. 988 (1957). The Court further stated,

> What the non-Indian appropriators may have is only the excess over and above the amounts reserved for the Indians. It is plain that if the amount awarded the United States for the benefit of the Indians in the *Winters* case equalled the entire flow of the Milk River, the decree would have been no different.

Id.

[32]T. Malthus, *Essay on the Principle of Population* (1798). Since virtually all economists agreed that an uncritical acceptance of this Malthusian Principle was untenable, the search for an objective way to determine the subsistence needs of labor was abandoned and the minimum-of-existence theory was discredited as resting wholly on social commentary.

> [M]ost of these utterances were preanalytic in nature. They reveal sentiments and evaluations that reflect important aspects of social history and are a legitimate object for the

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the solemn promises inherent in treaties and allows states' elected jurists to recast longstanding principles for determining the extent of Indian water rights over into some specious battery of "minimal" Indian existence tests, such tests will, of necessity, be based upon thoroughly discredited and insupportable economic theorems.

3. Tests Based on Minimal-Existence Theorems Will Be Administered With Aggressive Severity

In the absence of any objective standard, state court administration of any "minimal" or "moderate" needs tests could easily be contaminated by unbridled discretion and might inevitably result in the virtual dismantling of Indians' water rights. Wyoming in particular urges this Court to discard the PIA standard, alleging that its use as a measure of tribes' agricultural water rights effectively creates "windfalls" for tribes (Wyo. Brief 28)[33] which

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> application of Marxist theory of ideology . . . . [H]owever, these sentiments mean only an additional difficulty of interpretation: we are driven to unraveling elements of analysis from the various recommendations of our authors—or such reasons as they give for their normative statements—and in doing so we are in *constant danger of mistaking for an analytic proposition what may have been no more than a profession of sympathies.*

J. Schumpeter, *History of Economic Analysis* (New York: University Press, 1954), 266-67 (emphasis added).

[33]Windfalls are viewed by economists as changes in the value of traders' portfolios brought about by unexpected variations in prices, interest rates, and income. See J.M. Keynes, *The General Theory of Employment, Interest and Money* (New York: Harcourt Brace and World, Inc., 1964) 135-244; B. Pesek, et al., *Money, Wealth and Economic Theory* (New York: Macmillan, 1967) 3-38; D. Patinkin, "Money and Wealth: A Review Article," *Journal of Economic Literature*, Vol. 7 (December 1969) 1140-60; K. Arrow, "The Future and Present in Economic Life," *Economic Inquiry*, Vol. XVI, No. 2 (1978), 157-169; and A. Lei-

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will vanquish "industry and thrift" from Indians' "habits." *Id.* at 19, n.25, (interpreting the position of the United States in *Gila River Pima-Maricopa Indian Community v. United States*).[34]

Wyoming's argument exhibits striking similarities to an "attitude of aggressive severity" espoused by economists as early as 1664 in order to justify an untenable "utility of poverty" doctrine.[35] Under the guise of discouraging sloth and indolence, the poverty doctrine held that laborers, as a class, must—in the national interest—be subjected to low wages and high commodity prices sufficient to bind them in a perpetual state of poverty. This popular proposition was simply a variant of the minimal-

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jonhufvud, *On Keynesian Economics and the Economics of Keynes*. (New York: Oxford University Press, 1968) 187-385. Satisfaction of tribal reserved water rights merely confirms the value of tribal water resources and creates no such windfalls.

[34]Indian people are among the most impoverished in American society. Based on Bureau of Census figures for 1980, for all persons on the Fort Hall Reservation, only sixty-six percent live above the poverty line. It is clear that poverty falls disproportionately upon the Indian segment of the Reservation population. Forty-six percent of the Indian households on the Reservation live below the poverty line whereas only seventeen percent of non-Indian households live in poverty at Fort Hall. Similar imbalances are evident in Reservation employment patterns. In 1980, Indian people accounted for fifty-three percent of the Reservation population but comprised seventy-eight percent of people experiencing unemployment. In light of the disparaging differences between Indian and non-Indian employment at Fort Hall, and nationwide, coupled with an alarming number of impoverished Indian households subsisting at Fort Hall and on other reservations, Wyoming's petition, i.e., that this Court eliminate possibly all windfalls arising from a just settlement of tribal water entitlements, should give the Court—and the nation—great pause.

[35]Thomas Mun, *English Treasure* (1664), 182, cited in R. Furniss, *The Position of the Laborer in a System of Nationalism* (New York: Kelley & Millman, Inc., 1957), 117.

existence theorem which the classical economists first labored to justify and later abandoned or recanted.[36] In candid form, it was argued that extreme measures[37] were required to reduce the real wealth of the working class.[38]

B. Continued Adherence to PIA Is the Only Fair and Equitable Way to Honor Those Treaty Commitments Which Opened the West to Peaceful Settlement.

Certainty and finality are axioms adopted by this Court in its disposition of water rights cases.[39] Over the

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[36]It served a dual purpose. First, it provided a thinly-veiled justification for effecting a redistribution—from laborers to the owners of capital—of the surplus value (wealth) created in the production of commodities. Second, its uncritical acceptance led to strident advocacy for the proposition that if the impoverished and unemployed received windfalls in excess of their barest subsistence needs, such programs could only serve to defeat habits of industry and thrift amongst that social class.

[37]A combination of reduced wages, increases in commodity prices, and a diminishment of relief programs were deemed appropriate.

[38]Wyoming seeks to employ a similarly unfounded argument as a vehicle for convincing the Court to discard PIA, urging that, upon remand, the amount of Indian water rights reserved for agricultural purposes be reexamined so as to eliminate any "windfalls" which might afford that impoverished segment of the population to enjoy an improved standard of living. Such an uncritical reevaluation of Indians' subsistence needs would allow non-Indians, who have historically enjoyed the use of water reserved by and for the tribes, to effect a permanent destruction of Indians' wealth through transfer to non-Indians of the water resources vested in the tribes by the Legislative Branch and Executive Branch of the federal government.

[39]For example, in *United States v. New Mexico*, 438 U.S. 696 (1978), the Court limited the scope of federal reserved rights for the Gila National Forest by narrowly defining the purposes for which the forest was created. The Court has declined to increase the quantity of Indian rights due to previously omitted lands in *Arizona v. California*, 460 U.S. 605 (1983). Finally, in *Nevada v. United States*, 463 U.S. 110 (1983), the Court

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past 80 years, *Winters* has remained constant and viable because of this Court's adherence to the accepted doctrine of *stare decisis*. Judicial restraint has consistently assisted Indian tribes and states in the application of the PIA standard. The Shoshone-Bannock urge this Court to continue the "straight path of *stare decisis*" and not break with tradition. *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986). To detour would be to "replace what is ideally a sense of guaranteed right with the uneasiness of unsecured privilege." *Patterson v. McLean Credit Union*, — U.S.—, 108 S. Ct. 1419, 1423 (1988) (Stevens, J., dissenting).

This Court first observed the states' opposition to tribal rights in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), and later stated that the "people of the States where [Indians] are found are often their deadliest enemies." *United States v. Kagama*, 118 U.S. 375, 384 (1886). Similarly, Justice Stevens, dissenting in *San*

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refused to reconsider an earlier settlement of water rights even though an Indian tribe had not participated directly in the settlement agreement. PIA is a quantifying measure that has been utilized in water settlements and litigation which results in certainty and finality. Any abandonment of this standard would cause disruption with no predictable result and no end to water conflicts.

The use of PIA in quantifying Indians' reserved water rights was announced by the Court in 1963. This standard, however, was not a new measure; it developed over the years beginning in 1908 with *Winters*. See also *Conrad Investment Company v. United States*, 161 Fed. 829 (9th Cir. 1908); *Skeem v. United States*, 273 F. 93 (9th Cir. 1921); *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir.), *cert. denied*, 352 U.S. 988 (1957). Over the years, PIA proved to be a workable method and thus became a settled and acceptable, core principle, particularly useful in determining Indian tribes' future water needs. PIA is no boon for Indian tribes; rather, it provides a method for placing an upper limit, a ceiling, on water reserved for tribal agricultural endeavors.

Carlos, 463 U.S. at 575 (1983), noted that "States and their citizens may well be more antagonistic toward Indian reserved rights than other federal reserved rights, both because the former are potentially greater in quantity and because they provide few direct or indirect benefits to non-Indian residents."

Recognizing Indian tribes' apprehensions about litigation of any issue in state courts, let alone reserved water rights, this Court declared in *San Carlos:*

> [A]ny state-court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment.

Id. at 571.[40] If the propositions urged by the State of Wyoming and *amici* are accepted, Courts of the future will no doubt be obligated to review with "particularized and exacting scrutiny" a parade of incomprehensible lower court decisions whieh have been unable to apply any appropriate measuring device for quantifying Indians' reserved water rights.

---

[40]It was in *United States v. Carolene Products Company*, 304 U.S. 144, 152-53, n.4 (1938), decided the same day as *United States v. Shoshone Tribe*, 304 U.S. 111 (1938), that Justice Stone, speaking for a majority of the Court, suggested that this Court might well in the future be required to determine "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

IV. CONCLUSION

For the reasons set forth above, this Court should affirm the determination of the Wyoming Supreme Court regarding application and use of PIA in the facts of this case. The Shoshone-Bannocks, based on our experience, posit that the success or failure of the Snake River Basin negotiations, as well as future negotiations to resolve Indian reserved water rights claims in numerous other western states, turns on resolution of the question before the Court. As stated by Justice Black, dissenting in *Federal Power Commission v. Tuscarora Indian Nation,* 362 U.S. 99, 142 (1960): "Great Nations, like great men, should keep their word."

RESPECTFULLY SUBMITTED this 12th day of April, 1989.

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IN THE

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OCTOBER TERM, 1988

STATE OF WYOMING,

Petitioner,

v.

UNITED STATES OF AMERICA, SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Wyoming

BRIEF OF THE NATIVE AMERICAN RIGHTS FUND, THE HOPI TRIBE, THE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION, THE NEZ PERCE TRIBE, THE SOUTHERN UTE INDIAN TRIBE, THE CHEYENNE RIVER SIOUX TRIBE, THE COLORADO RIVER INDIAN TRIBES, THE NAVAJO NATION, THE BLACKFEET TRIBE, THE NORTHERN CHEYENNE TRIBE, THE PYRAMID LAKE PAIUTE TRIBE, THE ASSINIBOINE AND GROS VENTRE TRIBES OF THE FORT BELKNAP RESERVATION, THE PUEBLO OF LAGUNA, THE PUEBLO OF SANTA ANA, THE JICARILLA APACHE TRIBE, THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION AND THE NATIONAL CONGRESS OF AMERICAN INDIANS AMICI CURIAE

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INTERESTS OF AMICI

Each of the *amici* tribes (1) has had its reserved water rights quantified in part, or (2) is currently involved in general stream adjudications, or (3) has concluded negotiations with states, quantifying its reserved water rights, or (4) is involved in or is about to begin water rights negotiations or litigation. The outcome of this case is thus of direct consequence to them. The Native American Rights Fund and the National Congress of American Indians are two major national Indian organizations, supporting Indian rights.

Amici urge this Court to affirm the decision below as to the Wind River Tribes practicably irrigable acreage, and to grant the Tribes' cross-petition recognizing the broader reservation purpose affirmed by the Master below, and the Tribes' reserved right to groundwater. The Court, in so doing will continue the protection of Indian water rights assured in *Winters v. United States*, 207 U.S. 564 (1908) and *Arizona v. California*, 373 U.S. 546 (1963). Written consent of the parties to the filing of this brief has been obtained and lodged with the Clerk.

SUMMARY OF ARGUMENT

1. Indian tribes gave up most of their lands and agreed to settle on reservations—permanent homelands they reserved for themselves. They are entitled to the full economic value of their reservations, which includes unqualified beneficial ownership of all the natural resources of the reservation. *United States v. Shoshone Tribe*, 304 U.S. 111 (1938).

It was presumed long before *Winters v. United States*, 207 U.S. 564 (1908), that when reservations were created by or for tribes, the water appurtenant to the reservations was reserved. *Winters* confirmed this understanding, enjoining uses by non-Indians that interfered with the Indians' use of their reserved water, even though

the non-Indians put the water to use first and would have had precedence under state law. This Court has similarly protected Indian fishing rights both on and off reservations. *Washington v. Washington Fishing Vessel Assn.*, 443 U.S. 658 (1979); *United States v. Winans*, 198 U.S. 371 (1905).

2. This Court's decision in *Arizona v. California*, 373 U.S. 546 (1963), responded to the need for quantification of tribes' reserved rights, with a maximum use decreed for present and future rights to facilitate planning. Almost all of the issues raised here were also raised and considered in detail in *Arizona*. For instance, in *Arizona* as here, there were turn of the century statutes referring to appropriations for water on reservations under state law. The special master noted that being subject to state water law would have put the Indians in a race with non-Indian water users that the Indians would inevitably lose. He found this contrary to the intent of Congress. This Court agreed.

3. Court decrees and congressionally approved settlements have quantified the reserved rights of numerous tribes under the standards of this Court in *Winters* and *Arizona*. Indian tribes with decrees and settlements have dramatically increased irrigated agriculture on their reservations, helping gain tribal self-sufficiency. This belies arguments that Indians do not need or cannot use water decreed to them. Congress has confirmed that this water development is necessary for Indian economic self-sufficiency.

4. Increased Indian water use has not unfairly impacted on non-Indian users. The "gallon-for-gallon" reduction feared by non-Indians has not occurred. New Indian projects usually require federal funds, years to build, and commonly provide additional water for all parties. As Indian development proceeds gradually, non-Indian junior users generally continue their use of Indian water for years. But a junior user cannot forever preclude use by a holder of a legally senior water right.

5. Continued adherence to the standards of *Winters* and *Arizona* is the only fair course. Litigated cases and congressional settlements have been based on these standards. The standards are not unclear or confusing and foster settlements. This Court's decision in *United States v. New Mexico*, 438 U.S. 696 (1978), dealt with the narrow purposes of a national forest, not the broad purposes of an Indian reservation, and does not in any way limit *Winters* or *Arizona*. The weighing of equities standard suggested by petitioner is no different from the balancing tests rejected in *Arizona* and more recently unanimously rejected by this Court in *Cappaert v. United States*, 426 U.S. 128 (1976).

ARGUMENT

I. INDIAN RESERVATIONS WERE ESTABLISHED TO PROVIDE PERMANENT HOMELANDS FOR INDIAN TRIBES. THEY NECESSARILY INCLUDE THE WATER ASSOCIATED WITH THE LAND.

A. Tribes are Entitled to the Full Assets of Their Reservations.

The Wind River Tribes tried their water case in state court and proved their right to water for the practicably irrigable land on their Reservation under the standards set by this Court. A state special master, the state district court and the State Supreme Court all affirmed the Tribes' reserved right to water for the practicably irrigable land on their Reservation. The State, having failed to win by the rules, even in its own courts, now asks this Court to change the rules.

This case will thus determine whether the Court will honor the property rights in water established for Indian tribes as part of their reservations, confirmed in *Winters v. United States*, 207 U.S. 564 in 1908 and reconfirmed in *Arizona v. California*, 373 U.S. 546 in 1963. Or whether, when the Indians' property is desired by others, this Court will redefine the rules so that tribes will lose much of the value of their reservations, at a time when significant progress towards economic self-sufficiency is

being realized under the standards long established by this Court.

Reserved rights are property rights. Treaties, statutes and executive orders reserved areas to Indian tribes as permanent homelands. The tribes gave up enormous areas of land, keeping very little. They have paid an enormous price. Indians are morally and legally entitled to the full economic value of the reservations they kept. *See United States v. Winans*, 198 U.S. 371, 380-381 (1905); *Winters*, *supra*, at 576-577; *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938).

1. *The example of natural resources.*

A reservation includes all natural resources, not just land. A leading case so holding involved the Wind River Reservation, at issue here, and the Shoshone Tribe's ownership of timber and other natural resources. The Court rejected arguments that, when the Shoshone Tribe obtained its Reservation, it merely obtained the right to use and occupy the reserved lands, and not any proprietary interest in the reservation resources:

> The principal purpose of the treaty was that the Shoshones should have, and permanently dwell in, the defined district of country. To that end the United States granted and assured to the tribe peaceable and *unqualified* possession of the land in perpetuity. Minerals and standing timber are constituent elements of the land itself.

Shoshone Tribe, *supra*, at 116 (emphasis added). The Indian right in such resources was held to be as valuable as a fee simple ownership. *Id.* at 116-117.

2. *The example of fishing rights.*

Similarly, this Court has protected Indian treaty fishing rights, even off-reservation and where the result was a fish-for-fish diminution in non-Indian fishing. In *Winans*, *supra*, at 381, the Court held that a state law licensing a non-Indian to run a commercial fish wheel could not limit access by Yakima Indians to off-

reservation fishing grounds at which the Tribe had reserved the right to fish "in common with" the people of the territory:

> The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. . . . Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.

In *Winans* the Court also rejected the non-Indian's argument that his method of fishing was more efficient and should therefore supercede Indian fishing:

> It needs no argument to show that the superiority of a combined harvester over the ancient sickle neither increased nor decreased rights to the use of land held in common.

Id. at 382.

More recently, this Court in *Washington v. Washington Fishing Vessel Assn.*, 443 U.S. 658 (1979), strongly upheld tribal treaty rights despite arguments that non-Indians would lose portions of fish runs that they had long been taking, and would lose investments in boats and gear. Justice Stevens, writing for the Court, affirmed the justice of the Indian position and the long jurisprudence supporting it:

> In our view, the purpose and language of the treaties are unambiguous; they secure the Indians' right to take a share of each run of fish that passes through tribal fishing areas. But our prior decisions provide an even more persuasive reason why this interpretation is not open to question. For notwithstanding the bitterness that this litigation has engendered, the principal issue involved is virtually a "matter decided" by our previous holdings.

Id. at 679. Here, too, prior decisions of this Court virtually decide the principal issues raised by Wyoming and supporting *amici*.

B. In *Winters v. United States*, This Court Confirmed What Had Already Been Understood: That Upon Establishment of An Indian Reservation, Water Was Reserved to Fulfill The Reservation's Purpose.

Prior to the turn of the century, there was no doubt that a tribe or the United States in reserving land also reserved the water appurtenant to the land.[1] After the Reclamation Act of June 17, 1902, 32 Stat. 388—in which the United States agreed to be bound in certain respects by state water law—the states began to question federal control over water on reserved lands. The uncertainty created is illustrated in a 1906 report of the Commissioner of Indian Affairs:

> Prior to . . . [the Reclamation Act of 1902] there seems to be no instance of anyone denying the right and power of the General Government to appropriate sufficient water on an Indian reservation for the needs of the Indians. Recently, however, these have been denied. . . .
>
> But surely . . . Congress . . . could appropriate waters in Indian reservations for the use and benefit of the Indian occupants of those reservations. Whenever the subject has been fairly presented to the Congress it has taken this view, and so far the courts also have sustained the rights of the Indians.

Report of the Commissioner of Indian Affairs, 1906 Annual Report of the Department of the Interior at 83.

The issue did not long remain in doubt. In 1908, this Court affirmed Indian water rights in circumstances that directly impacted competing water users. In an 1888 agreement, the Fort Belknap Indian Reservation was established "as and for a permanent home and abiding place of

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[1] Under the Desert Land Act, 19 Stat. 377 (1877), homesteaders received water under state law, but this Act did not apply to Indian and federal reserved lands.

the [tribes]." *Winters, supra* at 565. The Tribes ceded the territory they did not reserve. Winters and other non-Indians acquired ceded land upstream from the reservation, irrigated the land, and obtained state water rights. At the time of trial, the Indians were also diverting water for irrigation, most of which they began using *after* the appropriative rights of the non-Indians vested under state law.[2]

The United States sued to protect the tribes' rights. The Court rejected arguments by the non-Indian irrigators that the Indians had no reserved right because the ceded lands would be useless if the Indians had reserved the water for their reservation:

> We realize that there is a conflict of implications, but that which makes for the retention of the waters is of greater force than that which makes for their cession. The Indians had command of the lands and the waters,—command of all their beneficial use, whether kept for hunting, "and grazing roving herds of stock," or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?

207 U.S. at 576. These rhetorical questions were answered in the negative; the Court held the Indians did not give up their water. The supposition that the Tribes had given up most of their land and kept their Reservation without the water to develop "agriculture and the arts of civilization" was simply not credible. *Ibid.*

C. This Court in *Winters* and the Lower Federal Courts Responding To *Winters* Protected Indian Water Rights As Needed, Without Attempting To Quantify The Entire Reserved Right.

Winters placed no limit upon the amount of water to which the tribes were entitled in the future. The Indians had reserved the waters which made their Reservation

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[2] See Master's Report *Arizona v. California*, p. 257-258, appended to the Solicitor General's Brief.

"valuable or adequate." A present interference was enjoined. Future interferences could also be enjoined. The decree was thus open-ended.

Similarly, in *Conrad Inv. Co. v. United States*, 161 F. 829 (9th Cir. 1908), the court enjoined an upstream non-Indian user. In discussing the quantity of water reserved for the Indians, the court said:

> What amount of water will be required for these purposes may not be determined with absolute accuracy at this time; but the policy of the government to reserve whatever water . . . may be reasonably necessary, not only for present uses, but for future requirements, is clearly within the terms of the treaties as construed by the Supreme Court in the Winters case.

Id. at 832. The court's decree was specifically "subject to modification, should the conditions on the reservation at any time require such modification." *Id.* at 835.[3]

In *United States v. Walker River Irrig. Dist.*, 104 F.2d 334 (9th Cir. 1939), the court limited the Walker River Paiute Tribe's reserved right to an amount of water based on their past irrigation needs, assuming that the tribe's future needs would be satisfied by that amount. But in *United States v. Ahtanum Irrig. Dist.*, 236 F.2d 321, 327 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957), the Court discussed *Walker River*, but followed *Conrad*, holding that:

> [T]he paramount right of the Indians to the waters of Ahtanum Creek was not limited to the use of the Indians at any given date but this right extended to the ultimate needs of the Indians as those needs and requirements should grow. . .

In sum, prior to this Court's decision in *Arizona*, Indian reserved water rights were consistently vindi-

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[3] Wyoming asserts that there is no suggestion in *Conrad* that the Tribe's water right should increase if its needs should become greater. Wyoming Br., p. 22, n.30. As the quoted language indicates, the State is simply wrong. See also F. COHEN, HANDBOOK OF INDIAN LAW, 318 (1942 ed.).

cated, but were generally left open-ended. And during this period, almost all western water development that took place served non-Indians. As the National Water Commission stated in 1973:

> During most of this 50-year period [following . . . *Winters* . . .], the United States was pursuing a policy of encouraging the settlement of the West and the creation of family-sized farms on its arid lands. In retrospect, it can be seen that this policy was pursued with little or no regard for Indian water rights and the *Winters* doctrine. . . . In the history of the United States Government's treatment of Indian tribes, its failure to protect Indian water rights for use on the Reservations it set aside for them is one of the sorrier chapters.[4]

II. THE PRACTICABLY IRRIGABLE ACREAGE STANDARD ESTABLISHED IN *ARIZONA v. CALIFORNIA* PROVIDES NEEDED CERTAINTY IN QUANTIFYING TRIBAL RESERVED WATER RIGHTS AND FULFILLS THE PROMISES OF THE INDIAN RESERVED RIGHTS DOCTRINE.

A. *Arizona v. California* Required The Determination Of The Present And Future Water Needs Of The Tribes.

This Court's decision in *Arizona v. California*, 373 U.S. 546 (1963),[5] brought into sharp focus the importance of tribal reserved water rights in the allocation and utilization of the nation's water resources. *Arizona* changed the open-ended uncertainty of prior court decrees of Indian reserved rights, thus allowing both Indians and non-Indians to plan for the future.

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[4] NAT'L WATER COMM'N, WATER POLICIES FOR THE FUTURE—FINAL REPORT TO THE PRESIDENT AND TO THE CONGRESS OF THE UNITED STATES, 474-475 (GPO, 1973).

[5] *Decree entered*, 376 U.S. 340 (1964), *decree amended*, 383 U.S. 268 (1966), *supplemental decree entered*, 439 U.S. 419 (1979), *supplemental opinion*, 460 U.S. 605 (1983) ("*Arizona II*"), *second supplemental decree entered*, 466 U.S. 144 (1984). Unless otherwise stated, references in this brief to *Arizona* or *Arizona v. California* are to the 1963 decision affirming the Master's Report.

In 1952, Arizona filed suit in this Court to determine its share of water from the Colorado River. Without such a determination, Arizona could not obtain federal assistance in building the long-coveted Central Arizona Project. The United States intervened, asserting, among other things, reserved water rights for twenty-six Indian reservations located in the lower Colorado River Basin.[6] That matter was referred to a special master, who held lengthy hearings on the issues presented. *Arizona*, 373 U.S. at 551. For the first time, the resolution of an issue of national significance required the permanent quantification of agricultural and associated rights reserved for future use by Indian tribes.

Arizona's interest was strongly against any Indian reserved rights. Water granted for use on reservation lands in Arizona would come out of that State's share. The importance of the issue, and the variety of reservations—created by statute or executive order as well as by treaty—led to a full and broad consideration of standards for quantification of water reserved for agriculture by Indian tribes. Contrary to California's assertions here (Br., pp. 9-13), these were "lengthy proceedings" in which Indian water rights were vindicated "over strong objection." *Arizona II*, 460 U.S. 605, 609-610 (1983).

B. Almost Every Issue Raised By Wyoming And The *Amici* Supporting Wyoming Was Raised And Answered Squarely in *Arizona*.

Arizona contested every aspect of the tribes' water rights: whether rights were reserved; if so, whether they had been extinguished; and, if not, how they should be measured. The issues are so much the same as those raised by Wyoming here that a ruling for Wyoming is tantamount to reversing *Arizona*.

For example, Wyoming argues (Br., 19-21) that the 1905 Act providing funds to secure water rights under

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[6] Ultimately, it was necessary only to determine the rights of the five reservations on the lower reaches of the mainstream.

Wyoming law showed an intent to substitute state appropriations for reserved rights. Arizona made similar arguments based on a 1904 Act which authorized the Secretary of Interior to divert water for the Reservation "in like manner as though the same were a part of the public domain." (*id.* p. 142), and a 1910 Act appropriating funds to build canals "for the purposes of securing an appropriation of water" (*id.* 144). The Special Master rejected the argument that the Tribes were expected to acquire water under state law, noting:

> It must have been apparent that if they were thrown into competition with the more advanced non-Indians in a race to acquire rights to water by putting it to beneficial use, they would have lost the match before it was begun.

Id. at 261.

Arizona also argued that reserving water is uneconomical because it keeps the water from being put to immediate use (Opening Br. p. 154) ; [7] that the needs for water should be measured by "uses or needs existing either now or at the time the Reservations were established," [8] and that no more than the needs of the number of Indians currently on the reservation should be allowed.[9] *Id.*, at 154-165. The Master rejected *all* these arguments as failing to provide for the future needs of the Indians as intended by Congress or the Executive in establishing the reservations:

> Invariably the United States intended that the Indian tribes settled on a Reservation would remain there for generations, and the possibility that other

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[7] Similarly, Wyoming and supporting *amici* complain here that reserved water rights for Indians frustrate optimum allocation of resources (*e.g.*, Salt River Project Br., p. 13-14).

[8] Wyoming and its *amici* urge historic use as the standard here (*e.g.* Wyoming Br., pp. 22-24, Ariz. Br., p. 22), although they concede this Court rejected that standard in *Arizona* (Wyoming Br., p. 24).

[9] Wyoming and supporting *amici* urge the Court similarly to limit Indian reserved rights (*cf.* Ariz. Br., pp. 20-22).

> Indians would be settled on the Reservation could not be excluded. Certainly the possibility of expanding populations, expanding agricultural development, and hence expanding water needs must have been apparent at the time each Reservation was created. It is unreasonable to attribute to the United States an intention or an expectation that the Indians would remain stagnant or die out when they were settled on a Reservation.

Master's Report at 260-261.

The Master concluded that an award based on current Indian population or needs would require open ended decrees to account for changing circumstances, and this would put all junior water rights in jeopardy and severely hamper financing of irrigation projects. *Id.* at 264. The Master also found (*id.* at 266) that tying water rights to the future development of the reserved lands was actually more in accord with the standards of water management throughout the West and with the status of reserved rights "as property rights":

> [T]he decree establishes a property right which the United States may utilize or dispose of for the benefit of the Indians as the relevant law may allow. See *United States v. Powers*, 305 U.S. 527 (1939).

This Court, after extensive briefing on the issues (*see* Arizona's opening brief), specifically rejected equitable apportionment between Indians and non-Indians as inappropriate, *id.* at 597,[10] and affirmed the Master's reasoning and decree:

> [The Master] found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations. . . . How many Indians there will be and what their future needs will be

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[10] The Court did the same more recently in *Cappaert v. United States*, 426 U.S. 128 (1976), discussed at pp. 28-29 *infra*.

> can only be guessed. We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage. The various acreages of irrigable land which the Master found to be on the different reservations we find to be reasonable.

373 U.S. 600-601.

C. What *Arizona* Held And What It Did Not Hold.

Arizona provided clear standards for determining the amount of water impliedly reserved for agriculture and related uses in the reservation of lands for Indians whether by treaty, statute or executive order. The decision, as we show in the next sections, has been widely followed by this Court, lower courts and Congress and has been enormously useful.

While *Arizona* gave the standards for quantification as to agricultural and related needs, it did not attempt to quantify what is needed for a tribal homeland where there are major water needs other than for agriculture. Agricultural uses in *Arizona*, as is often the case, dwarfed other uses. But because reservations were set aside as permanent homelands, tribes are clearly entitled to use water for their people to drink, for their cattle to drink, to exploit minerals, to develop industry, to preserve instream flows for fisheries, and for cultural and religious purposes and recreational uses. Non-agricultural uses were so small in *Arizona* compared to large agricultural uses that the United States did not seek special quantification of them. But on some reservations, particularly where there are large populations, minerals or industrial production, but little irrigable land, these uses form a basic part of the reservation. Nothing in *Arizona* should foreclose proof of these needs in such cases.

Arizona did not discuss groundwater. While groundwater uses are not a direct part of the grant of certiorari here, they are so important to some tribes that the Court in ruling here should not inadvertently limit tribal

use of groundwater. At the time most Indian reservations were created, the prevailing law on groundwater was the common law rule that the owner of the surface owns all the percolating waters (ordinary groundwater, not in defined underground streams) under the surface. As stated in the NATIONAL WATER COMMISSION, A SUMMARY—DIGEST OF STATE WATER LAWS (G.P.O. 1973), p. 52:

> Before the science of ground water hydrology was very well understood, it was assumed that percolating water was a part of the land in which it was found, and that the owner of the land owned such water in the same manner that he owned the trees and rocks on the land, or the oil, gas, and other minerals found beneath the surface.

When an Indian tribe reserved land, or had land reserved for it, the understanding of the tribe and of the United States would necessarily have been that the Tribe reserved and remained the *owner* of its groundwater. Thus under *Winters* tribes clearly have a reserved right to groundwater.

In *Cappaert v. United States*, 426 U.S. 128 (1976), by analogy to *Winters*, this Court held that when the United States reserved a national monument to protect a pool of pup-fish, it could enjoin persons with a junior water right from pumping groundwater that would interfere with the reserved right. Tribes, too, obviously have the right to enjoin uses that interfere with their use of groundwater.

Nothing in *Winters* or *Arizona* should limit a tribe's use of groundwater or measure it solely by agricultural needs. A tribe may have little practicably irrigable acreage and yet have considerable uses for its groundwater. The right to use groundwater for municipal and other purposes is literally an issue of life or death, prosperity or poverty, to the desert tribes which often rely substantially on groundwater, and for whom groundwater may be their most valuable material resource. Deep

groundwater particularly may not be practical for irrigation but may be invaluable for municipal or industrial needs. The issue of groundwater ownership and uses should thus either be considered separately here, or reserved for determination later.

III. INDIANS NEED WATER RESERVED UNDER THE *WINTERS* DOCTRINE FOR ECONOMIC SELF-SUFFICIENCY AND USE THE WATER ONCE IT IS QUANTIFIED.

A. Since *Arizona*, Indian Tribes Have Dramatically Increased Irrigated Agriculture On Reservations.

Wyoming and supporting *amici* posit that *Winters* and *Arizona* result in decreeing "too much" water to Indian tribes, water that tribes allegedly cannot use and do not need. (E.g., Wyoming Br., p. 32). The actual experience of tribes with quantified rights since *Arizona*, however, shows that tribes *do* use the water decreed to them, and need that water to make progress toward economic self-sufficiency.

The five tribes in *Arizona* were decreed 905,496 acre feet for 135,636 practically irrigable acres. 376 U.S. at 344-345. In the early 1960s, these tribes were actually irrigating less than 36,000 acres. (Calif. Br., p. 13). By contrast, in the early 1980s, the five tribes used approximately 700,000 acre feet, irrigating about 100,000 acres, *see Arizona II*, 460 U.S. at 653, n.8. This represents an increase of over 60,000 acres under cultivation, an important advancement for the nation's poorest group.

Several other tribes have entered into congressionally-approved arrangements since *Arizona* that have significantly expanded Indian irrigated acreage under cultivation. On the Navajo Reservation, Congress authorized and the Interior Department constructed an irrigation project serving 110,630 Indian owned acres. Navajo Indian Irrigation Project Act, Sec. 2, 76 Stat 96 (1962) as amended. This was part of an agreement in which the

Navajo Tribe relinquished preferential rights to substantial quantities of water from the San Juan River, most of which is now used by the City of Albuquerque. In the past decade, Congress has also enacted six statutes (some still requiring appropriations) establishing the quantified reserved water rights of a number of tribes—all the tribes in Colorado,[11] five Mission bands in Southern California,[12] and three tribes in the Central Valley of Arizona.[13] More congressionally approved settlements are very likely.[14]

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[11] Colorado Ute Indian Water Rights Settlement Act, Pub. L. No. 100-585, 102 Stat. 2973 (1988) (Colorado Ute Act).

[12] San Luis Rey Indian Water Rights Settlement Act, Title I Pub. L. No. 100-675, 102 Stat. 4000 (1988) (San Luis Rey Act).

[13] Salt River Pima-Maricopa Indian Community Water Rights Settlement Act, Pub. L. 100-512, 102 Stat. 2549 (1988) (Salt River Act); Southern Arizona Water Rights Settlement Act, Pub. L. No. 97-293, 96 Stat. 1261 (1982) (Pagago Act). There was one Ak-Chin Act in 1984, Act of October 19, 1984, Pub. L. No. 98-530, 98 Stat. 2698. This Act was preceded by an earlier, 1978 enactment, the Act of July 28, 1978, Pub. L. No. 95-328, 92 Stat. 409.

[14] *E.g.*, S. 536, 101st Cong., 1st Sess., a bill to settle issues relating to Ute water rights (approving compact between Ute Indian Tribe and State of Utah); March 8, 1989 letter from Senators Inouye and McCain to Senator's Sasser and Domenici, lodged with the Clerk, pp. 2, 10: ("various legislative settlement initiatives . . . are anticipated to be enacted during the 101st Congress . . . [for] Indian claims to land and water similar to those enacted in 100th Congress . . . . All settlements contemplated, as well as those recently enacted, provide substantial benefits to non-Indian water users . . . [and] preclude the necessity for further protracted and costly litigation of competing claims to land and water in western states.") (*five water rights settlements* nearing completion . . . are expected to reach legislative settlement this year.") (emphasis in original)

Montana and the Assiniboine and Sioux Tribes of the Fort Peck Reservation have negotiated a compact quantifying tribal water rights that does not require congressional ratification because no federal appropriations are necessary and the compact will be incorporated into final court decrees. S.B. 467, Chap. 735, Laws of Montana, 1985.

Each statute settled existing or imminent general stream adjudications.[15] Although the historic facts of each settlement varied, the basic pattern was a common one in the West (see p. 10, *supra*): non-Indians had appropriated existing surface and groundwater resources, thereby denying tribes sufficient waters to irrigate their lands. For example, non-Indian diversions from the San Luis Rey River system in California commencing in the 1890s limited the water available for the Mission Bands, which gave rise to the litigation. See San Luis Rey Act, Secs. 103(a)(2) and 103(a)(3); H.R. Rep. No. 100-780, *supra*, p. 14-15. The same pattern exists along the Salt River in Arizona, where a federal reclamation project appropriated virtually the entire surface flow, including storage sites, in the first decades of this century. See H.R. Rep. No. 100-868, 100th Cong., 2nd Sess. pp. 9-13 (1988). At the Ak-Chin Reservation in central Arizona, since the 1940s "extensive agricultural development by non-Indians surrounding the Reservation . . . through the mining of underground water . . . [had] resulted in a severe decline of water table depths and in a drastic change in the shape and flow patterns of the underground basin." H.R. Rep. No. 98-1026, p. 5 (1984). Nevertheless, the Tribe in 1962 established a "highly profitable Indian-owned [farming] enterprise and . . . achieved near economic self-sufficiency." *Ibid.* As a result of this farming enterprise "[t]he quality of life of the Community and its members . . . . dramatically improved. The various governmental and social services once provided to the members of the Community by the Federal government" were "funded from tribal income with little Federal funding needed." *Ibid.* However, "as a result of this

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[15] H.R. Rep. No. 100-932, 100th Cong., 2d Sess. p. 6 (1988), H.R. Rep. No. 100-780, 100th Cong., 2d Sess., pp. 14-15 (1988); *see generally Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984); H.R. Rep. No. 100-868, 100th Cong., 2d Sess. p. 11 (1988); H.R. Rep. No. 97-422, 97th Cong., 2d Sess. p. 12 (1982). Some of these cases are incorrectly characterized in Ariz. Br., p. 12, n.6 as not being general stream adjudications.

off-reservation pumping, . . . the Community . . . had to reduce its irrigation acreage" by over 50 percent in the 1970s. *Id.* at 6.

In these approved settlements, Congress has affirmed the tribes' right to increase their water uses well above historic uses, and in most settlements Congress has provided the means to do so. See Part IV, *infra*. In Colorado, the two tribes will receive over 100,000 additional acre feet.[16] The Mission Bands receive 16,000 acre feet per year, in contrast to historic uses of around 2,000 acre feet annually. H.R. Rep. No. 100-780, *supra*, pp. 30, 48. The Salt River Act establishes that Tribe's reserved rights as 122,400 acre feet to irrigate 27,200 acres, H.R. Rep. No. 100-868, *supra*, pp. 8, 11, 18-19, which is six times its historic use. *Id.* at pp. 9, 13.[17] Congress in these settlements has strongly affirmed tribes' rights to fulfill their reservations' potentials. In all, around 400,000 new acre feet of water will be supplied to these tribes, and Indian irrigated acreage on these reservations should increase by over 70,000 acres.

This increased water is seen by Congress as a necessary condition for economic self-sufficiency of these tribes. For example, in the Salt River Act, Congress found that its goals of promoting Indian self-determination and economic self-sufficiency [18] could be met by:

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[16] H.R. Rep. No. 100-932, *supra*, at 34, 38, 42, 43. These projects serve a total of about 67,000 new acres with irrigation, most of it non-Indian owned. S. Rep. No. 100-555, 100th Cong., 2d Sess., p. 6 (1988).

[17] The Papago Act established reserved rights at 66,000 acre feet annually of surface water and 10,000 acre feet per year of groundwater pumping in contrast to historic irrigation of only 7,000 acres. H.R. Rep. 97-422, *supra*, at 14-15, 21. Ak-Chin's reserved rights are set at not less than 75,000 acre feet to farm 16,000 irrigated acres. H.R. Rep. 98-1026, *supra*, at pp. 6, 17. The historic use at Ak-Chin, after non-Indian groundwater depletions, was less than one-third of that amount. H.R. Rep. No. 95-954, 95th Cong., 2d Sess. p. 13 (1978).

[18] This has been *the* key federal Indian policy in the modern era. *E.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202,

> quantification of rights to water and development of facilities needed to utilize tribal water supplies.

and that such development was

> essential to the development of viable Indian reservation economies, particularly in arid western States[.]

Salt River Act, Sec. 2(a)(3), 102 Stat. 2549. The House Report considered that the settlement would provide the Tribe

> sufficient water and funds to develop a diverse and stable reservation economy, thereby advancing the Federal Indian policy goals of *self-determination and economic self-sufficiency.*

H.R. Rep. No. 100-868, *supra*, at 8 (emphasis added).[19]

Thus, under the standards established in *Arizona*, western Indian tribes have in the past quarter century placed about 200,000 new acres of land under cultivation, providing employment and relieving poverty. Settlements have made rights secure and have provided new water projects serving Indians and non-Indians alike. There are plans for tens of thousands acres more of irrigated

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219 ("[s]elf-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members"); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) ("Congress' objective of furthering tribal self-government . . . includes Congress' overriding goal of encouraging 'tribal self-sufficiency and economic development'"); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 and n.10 (1980) (describing "a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development.").

[19] Likewise, a primary purpose of the San Luis Rey settlement was to foster "the development of an independent economic base for the Bands." San Luis Rey Act, Sec. 103(b)(4) 102 Stat. 4001. The Colorado Ute Settlement is intended "to enable [the tribes] to develop their water resources and to otherwise make their reservations economically self-sufficient." H.R. Rep. No. 100-932, *supra*, at p. 6.

Indian agriculture under congressional approved settlements. None of this would have occurred without the standards set in *Winters* and *Arizona*. The new land being put into production is necessary for Indian economic self-sufficiency in arid western States, and refutes the claim that "[i]n general, tribes have little desire to develop extensive irrigation projects". (Ariz. Br., p. 10).[20]

B. The Standards Of *Winters* And *Arizona* Are Not Abstract Or Hypothetical, But Result In Judgments That Ensure That Realistic Projects Are Planned And Built.

The increased Indian water use in the quarter century since *Arizona* also answers the complaint that the practicably irrigable acreage standard is hypothetical or abstract. (E.g., New Mex. Br., p. 6). To be sure, the *Arizona* standard necessarily assesses what *can* be done, because it assesses potential for future, not past, irrigation practice. Because the "practicability" component of the standard is an engineering and economic one, the standard is realistic, as the thousands of new Indian acres that have gone into production under it attest.

Moreover, the evidence required to prove practicably irrigable acreage in an Indian water case assures a realistic assessment. Trial preparation typically begins with a hydrographic study of the surface and groundwater of the Reservation and surrounding area by irrigation engineers who will serve as expert witnesses. Then current and historic irrigation is documented, and undeveloped lands that might be practically irrigated in the future are identified. Soil scientists then study the soil to see

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[20] Wyoming (Br., pp. 32-33) and some *amici* postulate that tribes are really interested simply in marketing their water rights, not using them. As shown above, that has not been the experience since *Arizona*. To be sure, the Tribes in this case cross-petitioned from the portion of the decision below that denied them authority to transfer their water rights, but in so doing the Tribes were simply seeking the same right as that held by non-Indian users of state appropriative rights.

which of these lands can sustain long term irrigation. Detailed engineering studies are made laying out reservoirs, canals or pipelines and on-farm systems—usually highly efficient sprinkler or drip systems. The engineers "cost out" these plans. Agricultural economists then determine whether, in absolute terms and in comparison with other projects actually built, the land can be irrigated with a one-to-one benefit cost ratio or better. At each stage, lands not meeting the tests are dropped out.

At trial the master or judge hears the evidence of expert witnesses on both sides and determines how much practicably irrigable acreage has been proved. This Court has held that the preferential forum for adjudicating Indian reserved water rights is state court. *E.g.*, *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983); *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800 (1976). There is no reason to expect that state courts will award Indians water rights that have not been tested and proved for practicability, and here the Master, trial court and State Supreme Court all tested the evidence by that standard and ruled on the evidence. Far from promoting "speculative" schemes (compare New Mexico Br., p. 3), the *Arizona* standards have produced concrete Indian irrigation projects on thousands of acres.

Wyoming and supporting *amici* complain that under the practicably irrigable acreage standard, some tribes have *claimed* excessive water, indeed more water than the flow of certain surface streams. (*E.g.*, Ariz. Br., pp. 13-14; New Mex. Br., pp. 2-3, 6-7.) The short answer to that complaint is that those are claims, not judgments. This appeal deals with—and should of course be decided on—the actual judgment based on the actual record. The judgment in this case awards the Tribes far less than the full surface flow of the Big Horn River system, and substantially less than the tribes initially claimed. This is not a judgment awarding more water than there is in a stream; if such a judgment ever occurs—which we submit is very doubtful—it can be reviewed on its own record.

IV. *ARIZONA* AND SUBSEQUENT CASES AND SETTLEMENTS DO NOT UNFAIRLY IMPACT ON NON-INDIAN WATER USERS.

Wyoming and supporting *amici* express concern that enforcement of Indian reserved water rights will, by resulting in a supposed "gallon-for-gallon" reduction of water use by non-Indians, undermine non-Indian economic development and prosperity throughout western states. They argue Indian water rights should therefore be reduced where legally junior non-Indian users have actually put water to use. Compare Wyoming Br. pp. 35-36. This feared "gallon-for-gallon" reduction has not, however, actually occurred where Indian reserved water rights have been quantified and developed following court decrees or congressionally ratified settlements.

As Wyoming and its supporting *amici* concede, the use of water by the five tribes following *Arizona* did not directly impact valid existing uses. (*E.g.*, Ariz. Br., pp. 11-12). The Navajo Irrigation Project and Indian uses protected by congressionally authorized settlements—such as the Ak-Chin, Papago and Salt River Tribes in Central Arizona—receive water developed by new federal storage projects, transfers and exchanges of water.[21] The Colorado Ute settlement was agreed to and supported by the five non-Indian water conservancy districts in the area of the reservations,[22] S. Rep. No. 100-555, *supra*, at 4-5. It also provides for construction of new federal projects which will "leav[e] intact the historical uses already in place on these streams" (*id.* at p. 17) and which provide irrigation water to over 67,000 new acres, most of which are in non-Indian ownership. *Id.* at 6.

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[21] Water to satisfy the Ak-Chin, Papago and the Salt River Tribe quantifications comes in part from the Central Arizona Project, and in part from private non-Indian sales and exchanges of water rights. E.g., H.R. Rep. No. 100-868, *supra*, pp. 12, 15; H.R. Rep. No. 98-1026, *supra*, p. 17; H.R. Rep. No. 97-422, *supra*, pp. 14-15.

[22] State and local officials also commonly support these settlements as a means of augmenting or protecting non-Indian water supplies. E.g., S. Rep. No. 95-460, 95th Cong., 2d Sess., p. 5 (Ak-Chin 1978 Act).

Similarly, to protect existing uses at Salt River, Congress specifically authorized that Tribe to lease 13,300 acre feet of water they are entitled to receive from the Central Arizona Project to certain cities and towns for a period of 98 years. Salt River Act, Sec. 8 (d), 102 Stat. 2555. San Luis Rey water will probably be supplied by water conservation. H.R. Rep. No. 100-780, at p. 11. Non-Indians are not being adversely impacted by increased Indian water use because that use usually occurs by new storage, or as the result of improved water management—conservation, transfers and exchange of water.

Moreover, actual increases in Indian irrigation occur gradually, because very large capital investments—usually by federal appropriations (which non-Indians water users are able to influence)—must be undertaken. In the meantime, until Indian uses develop, the legally junior use by non-Indians can continue.[23] This gradual transition is eminently fair to non-Indians, for the Winters Doctrine quantification is forever, covering future as well as present uses. Accordingly, a prior investment by junior users—even over a period of decades—cannot fairly preclude forever putting the water to use by the legally senior Indians.

V. CONTINUED ADHERENCE TO THE STANDARDS ESTABLISHED IN *WINTERS* AND *ARIZONA* IS THE ONLY FAIR COURSE.

A. Cases Adjudicated Since *Arizona*, Congressionally Approved Settlements And Cases In Litigation Have All Relied On the Standards Established In *Winters* and *Arizona*.

1. *Litigated cases.*

Three federal cases since *Arizona* have finally adjudicated tribal water rights based on the standards in that

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[23] For example, the five tribes along the Colorado River are not yet using their full-entitlement under the decree. *Arizona II*, 460 U.S. at 653-655 (Brennan, J., dissenting); Metropolitan Water District, a prime beneficiary of this gradual transition, admits that this delay has allowed it to continue using a greater amount of water than its legal entitlement over this long period. (California Br., p. 19)

case. *United States v. Anderson*, 736 F.2d 1358, 1362, (9th Cir. 1984); *United States v. Adair*, 723 F.2d 1394, 1408-1411 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 46-47 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981). Four western states—Arizona, Montana, New Mexico and Wyoming—have also adopted the practicably irrigable acreage standard for determining the agricultural water rights of tribes located within those states. In addition to this case, *see United States v. Superior Court in and for Maricopa County*, 144 Ariz. 265, 697 P.2d 658 (1985); *In Re The General Adjudication of All Rights to the Water in the Gila River System & Source, W-1 through W-4*, (Superior Court of Ariz., Maricopa County, Order filed Sept. 9, 1988); *State of New Mexico ex rel. Reynolds v. Lewis*, Chaves County Nos. 20294, 22600 consolidated (1956) (See New Mex. Br., App. A, Conclusion of Law No. 22.); *State ex rel. Greely v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 219 Mont. 76, 712 P.2d 754 (1985).

2. *Congressional enactments.*

The congressionally approved settlements since 1963 have also applied this Court's standards in quantifying Indian reserved rights. The Ak-Chin settlement was based upon an assessment that the Tribe was entitled to between 70,000 and 100,000 acre feet under the Winters Doctrine based on this Court's standards. H.R. Rep. No. 95-954, *supra*, pp. 12-13. Similarly, the House Committee Report on the San Luis Rey Act states: "the Bands claim a *Winters* right to water for their reservations." (H.R. Rep. No. 100-780, *supra*, p. 13). Hearings on the bill had explained the:

> very comprehensive studies that were done to determine the irrigable acreage and other water requirements on the reservations.
>
> The water requirements were determined by agricultural engineers based on the crops that are grown in the area, as to how much water would be required to develop those irrigatable acres.

Hearings on H.R. 4468 Before the Subcommittee on Water and Power Resources of the Committee on Interior and Insular Affairs, 99th Cong., 2d Sess., Serial No. 99-78 at 92.

Redefining or overruling the *Winters* and *Arizona* standards would be manifestly unfair to tribes whose rights are still in litigation or before Congress, for it would treat new claims differently from resolved ones and create unwarranted economic disparities among tribes. Moreover, since Congress, in the more than 25 years since *Arizona*, has not seen fit to modify or criticize the standards set by this Court, the Court itself should be most reluctant to disturb the legitimate expectations on which Indian and non-Indian property owners—and Congress itself—have relied. *Square D. Co. v. Niagara Frontier Tariff Bur., Inc.*, 476 U.S. 409, 419-420 (1986); *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 410 (1975); *Cappaert*, 426 U.S. at 145.

B. The Determination Of Practicably Irrigable Acreage Has Not Been Rendered Uncertain Or Confusing By Decisions Of This Court After *Arizona*.

Wyoming and supporting *amici* claim there is "understandable confusion . . . in the courts below over the standard which now should be applied" in quantifying water rights on Indian reservations. Wyoming Br., p. 27. The supposed confusion is "[b]ecause of the apparent distinction between the reserved water right quantification standard announced in *Arizona I* and *II* (practicably irrigable acreage) and that more recently announced in *New Mexico* (necessity)". Wyoming Br., p. 27; *see* Chavez County Br., pp. 5-6. Wyoming and *amici* do not support their claim of confusion by reference to any lower court case that failed to apply the practicably irrigable acreage standard to an Indian tribal claim, and there is in fact no confusion in the lower courts. Like the Wyoming Supreme Court in this case, they have applied the standard developed by this Court for the quantification of Indian water rights. So has Congress.

This Court's decision in *United States v. New Mexico*, 438 U.S. 696 (1978), worked no change in the standard for quantification of Indian reserved water rights. In *New Mexico*, this Court cited both *Winters* and *Arizona* as cases where the United States had reserved water implicitly in order to fulfill the purposes of Indian reservations. 438 U.S. at 698-700 and n. 4. *New Mexico* concerned implied reserved water rights for a national forest, not an Indian reservation. The Court concluded that the intent of Congress in the Organic Administration Act pertaining to national forests "demonstrate(s) that Congress intended national forests to be reserved for only two purposes," to protect forest growth and to conserve water flows so as to supply a greater and more dependable quantity of irrigation water to users downstream. *Id.* at 706-713. The purposes of recreation, aesthetics and cattle grazing were secondary. Indeed, the Court concluded that "Congress authorized the national forest system principally as a means of enhancing the quantity of water that would be available to the settlers of the arid West." *Id.* at 713.

Because of these principal purposes, —to grow trees and for water to flow out of the forest—the Court held that the amount of water to be retained in the forest was limited to that minimally necessary to fulfill and not entirely defeat the primary purposes of the reservation. Wyoming's extrapolation of that properly parsimonious standard for forests to Indian reservations creates a confusion where none exists, and where no lower court has ever been confused.[24] When they established Indian reservations, Congress and the Executive had far broader purposes—to promote Indian civilization and economic self-sufficiency and to provide a secure homeland for tribes that had surrendered large land areas. And Congress obviously did not create Indian reservations to secure water flows and stable water supplies to down-

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[24] *See, e.g.*, the differences between federal and Indian reserved water rights as discussed by the Montana Supreme Court in *Greely*, 712 P.2d at 766-767.

stream non-Indian irrigators. When the different purposes underlying Indian reservations and forests are compared, any possible confusion disappears.

The reserved water rights of national forests considered in *New Mexico* are different in another respect from Indian reserved water rights. As the Court noted in *New Mexico*, numerous statutes make state law generally applicable in national forests, parks and monuments. 438 U.S. at 702. Indian reservations are not usually subject to state law. As the FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (1982 ed.) points out (p. 582, footnote omitted):

> The most important difference between Indian reservations and other federal reservations relates to limitations on state jurisdiction over Indian reservations as contrasted with the states' substantial and, in certain respects, primary jurisdiction over other federally owned lands.

Nor is there any evidence that a supposed "confusion" about application of the reserved rights doctrine has impeded settlement negotiations concerning Indian water rights. The large number of settlements recently concluded totally belies this complaint.[25] In fact, settlement is promoted by a clear doctrine like *Arizona*.

Wyoming and *amici* propose supplanting that clear doctrine with a balancing type test that considers all factors, needs and equities on each particular reservation. (*E.g.* New Mexico Br., pp. 11.) Like this Court in *Arizona*, a unanimous Court in *Cappaert*, 426 U.S. at 138-139 and n. 4, rejected just such an approach as follows:

> Nevada argues that the cases establishing the doctrine of federally reserved water rights articulate

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[25] While Idaho joins other *amici* in complaining about the confusion in doctrine, it admits it is close to concluding a settlement with the major tribe in Idaho on the Snake River. Ariz. Br., p. 19. In fact, Senators Inouye and McCain list the Shoshone-Bannock settlement with Idaho as one likely to require congressional ratification in this Congress. Letter, n.14 *supra*, p. 10.

an equitable doctrine calling for a balancing of competing interests. However, an examination of those cases shows they do not analyze the doctrine in terms of a balancing test. For example, in *Winters v. United States*, *supra*, the Court did not mention the use made of the water by the upstream landowners in sustaining an injunction barring their diversions of water. The "Statement of the Case" in *Winters* notes that the upstream users were homesteaders who had invested heavily in dams to divert the water to irrigate their land, not an unimportant interest. The Court held that when the Federal Government reserves land, by implication it reserves water rights sufficient to accomplish the purposes of the reservation.[4]

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[4] Nevada is asking, in effect, that the Court overrule *Arizona v. California*, 373 U.S. 546 (1963), and *United States v. District Court for the County of Eagle*, 401 U.S. 520, (1971), to the extent that they hold that the implied reservation doctrine applies to all federal enclaves since in so holding those cases did not balance the "competing equities." Brief for Nevada 15. However, since balancing the equities is not the test, those cases need not be disturbed.

C. It Would Be Manifestly Unfair And Contrary To The Intent Of Congress And The Executive When The Reservations Were Established To Overrule The *Arizona* Standards.

To be sure, the enforcement of Indian rights to use water may transfer the use of some resources from non-Indians to Indians. After all, that is the point of enforcing a right (although as noted in Part IV, a physical solution—more storage or more efficient management—usually occurs). The transfer of resources, to the extent that it occurs, fulfills the promises of the treaties and executive orders creating Indian reservations and adhered to by this Court for over a century. See *Washington v. Washington Fishing Vessel Assn.*, *supra*. "Great Nations, like great men, must keep their word." President Bush, Inaugural Address p. 4 (lodged with the Clerk); *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Justice Black, dissenting).

CONCLUSION

By denying tribes their water rights, Wyoming and supporting *amici* would force Indians—the poorest western group—to continue subsidizing water use by non-Indian users who are legally junior to them. One cause of Indian impoverishment has been retarded Indian water development, but that process is being gradually and responsibly reversed as Indian water rights have been quantified, enforced and developed under the standards set by this Court. That process should not be changed because Wyoming lost a case in its own courts. The judgment below should be affirmed as to its ruling on the Tribes' practicably irrigable acreage. The Tribes' cross-petition should be granted recognizing the broader reservation purpose affirmed by the Master below, and affirming the Tribes' reserved right to groundwater.

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